

PIGS, MATS, AND LITTLE GIRLS:
THE REALLOCATION OF CHILDREN DISGUISED AS KASTOM
ADOPTIONS IN VANUATU

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INTRODUCTION

As a consequence of its colonial past and relatively recent independence in 1980, Vanuatu's¹ plural legal system consists of a state court system and a *kastom*² system governed by chiefs at the community level. The two systems are distinct, but not always entirely separate. The choice of venue is largely left to the parties.³ Children can be adopted, for example, through the state courts or in *kastom* as sanctioned by local chiefs.⁴

While adoptions through the state courts do occasionally occur,⁵ *kastom* adoptions are far more common. State court adoptions are subject to the Convention on the Rights of the Child (CRC) and the

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¹ "Vanuatu" means "Our Land Forever" and was chosen at the nation's independence in recognition that the land was being returned to the indigenous population. Interview with Don Paterson, Emeritus Professor of L., Univ. of the S. Pac., in Port Vila, Vanuatu (Mar. 4, 2014) (on file with author). Professor Paterson is a leading authority on the laws and legal systems of Pacific Island countries.

² The terms "*kastom*" (or "*kastomary law*") and "custom" refer to the indigenous practices that are unique to Vanuatu. See Miranda Forsyth, *Beyond Case Law: Kastom and Courts in Vanuatu*, 35 VICTORIA U. WELLINGTON L. REV. 427, 429 (2004). The Bislama word is *kastom*; the English equivalent is custom. See *id.* This article follows the local practice and occasionally mixes in some Bislama words. Bislama words are in italics.

³ See generally *id.* at 434.

⁴ See Sue Farran, *Child Adoption: A Dilemma in a Plural Legal System: A Critical Comment on Recent Case Law*, 16 J. S. PAC. L. C-14, C-15 (2014) [hereinafter Farran, *A Dilemma in a Plural Legal System*].

⁵ Adoptions through the state court system are more likely to involve non-*ni-Vanuatu* who require formal adoptions orders for immigration purposes. See Jennifer Corrin, *Finding the Law on Adoption in Vanuatu*, 2013 INT'L SURV. FAM. L. 399, 404 (2013) (calling intercountry adoptions in *kastom* "unknown").

Adoption Act;⁶ however, it is widely accepted that neither applies to *kastom* adoptions. Instead, *kastom* adoptions are essentially transactional in nature and primarily intended as benefit to a third party—unlike state court adoptions, which are primarily concerned with a child's best interest and prohibit improper benefits to a third party.⁷ In general, the protections of the state adoption system are considered to be largely inapplicable, even irrelevant, in a *kastom* adoption.⁸

This Article begins with some general context and briefly describes the creation and evolution of *kastom* and the system of chiefs. As a basis for the analysis that follows, Part I describes the types of *kastom* adoptions. Part II argues that the child welfare principle (i.e., child's best interest) applies to *kastom* adoptions through the CRC, the Adoption Act, the Guardianship Act, or common law principles related to the custody of children. Additionally, anecdotal evidence from field research clearly establishes that *kastom* adoptions are almost never in a child's best interest. Likewise, the prohibition against improper benefits to third parties in exchange for adoption also applies to *kastom* adoptions through either the Adoption Act or common law principles related to the custody of children. Alternatively, even if *kastom* adoptions are subject only to *kastom*, Part III argues that the deeply gendered contemporary interpretation of *kastom* has led to adoption practices that cannot be reconciled with indigenous practices. In the end, while the plural legal system may be necessary and appropriate in some contexts, it creates a two-tier system for adoptions in which the interests of some children are protected and the interests of other children are ignored.

⁶ See *id.* at 403, 407 (explaining the application of the Adoption Act and the CRC to Vanuatu).

⁷ See Kenneth Nehrbass & Daniel Nehrbass, *Social Transactions or Christian Ministry?: International and Customary Adoption in Vanuatu*, 4 ON KNOWING HUMAN. J. 16, 22-23 (2020) (discussing the transactional nature of *kastom* adoptions); Corrin, *supra* note 5, at 409-10 (detailing the welfare interests taken into consideration by state courts).

⁸ Author's conclusion based on field research, including interviews with local lawyers, expatriates, and Don Paterson. See also Farran, *A Dilemma in a Plural Legal System*, *supra* note 4, at C-24 (explaining the detriments of holding customary law over international law).

BACKGROUND⁹

Long before the Europeans first sighted the archipelago now known as Vanuatu, the islands were inhabited by Melanesian people for thousands of years.¹⁰ Now a small independent island nation in the South Pacific, Vanuatu is a country of enormous diversity. Formerly known as New Hebrides, the Melanesian Y-shaped archipelago is situated between Fiji and the northeast coast of Australia.¹¹ It is spread out across more than 80 islands and 500 miles of ocean¹² and is considered to have the “highest density of languages per capita in the world,” with more than 100 local indigenous languages.¹³ Almost 80 percent of its 290,000 citizens, locally known as *ni-Vanuatu*,¹⁴ live in small villages in remote islands¹⁵ and almost half (44 percent) are minors.¹⁶

⁹ This article uses the terms “indigenous practices” or “*long kastom*” in reference to practices that existed prior to the missionaries’ arrival. “*Kastom*” is used in reference to practices identified first by the missionaries to describe the traditional ways and later as a contemporary shorthand to describe traditional ideas and practices believed to be unique to the *ni-Vanuatu* people, but not necessarily historically accurate.

¹⁰ See Don Paterson, *Vanuatu*, in *SOUTH PACIFIC ISLANDS LEGAL SYSTEMS* 365 (Michael A. Ntumu ed., 1993) [hereinafter Paterson, *Vanuatu*]; see also MIRANDA FORSYTH, *A BIRD THAT FLIES WITH TWO WINGS: KASTOM AND STATE JUSTICE SYSTEMS IN VANUATU* 1 (2009). “The first Europeans to visit the archipelago were Spanish, French and English explorers in the seventeenth and eighteenth centuries, followed by whalers in the 1820s and traders exploiting the islands for sandalwood, sea cucumber and indentured labor. The sandalwood trade continued from 1838 until 1865 when it was largely depleted. The labour trade between Vanuatu and New Caledonia started in 1857 and had extended to Fiji and Queensland by 1863.” *Id.*

¹¹ See Paterson, *Vanuatu*, *supra* note 10, at 365-66.

¹² Around 65 of the islands contained in the country’s “double chain” are inhabited. See *Our Member Countries, Vanuatu*, THE COMMONWEALTH, <https://thecommonwealth.org/our-member-countries/vanuatu> (last visited Dec. 15, 2022).

¹³ See Peter Whiteford & Reiko Yoshihara, *Social Protection in Small Island States in the Pacific: A Case Study of Child-Wellbeing in Vanuatu* 2 (Centre for Social Protection Conference, 2011), <https://www.ids.ac.uk/download.php?file-files/dmfile/WhitefordYoshihara2011SociaprotectioninVanuatuCSPconferencedraft.pdf>.

¹⁴ Corrin, *supra* note 5, at 399. *Ni-Vanuatu* is used to describe the indigenous inhabitants of Vanuatu. Lissant Bolton, *Chief Willie Bongmatur Maldo and the Role of Chiefs in Vanuatu*, 33 J. PAC. HIST. 179, 179 n.1 (1998) [hereinafter Bolton, *Chief Willie Bongmatur Maldo*].

¹⁵ See VANUATU NAT’L STAT. OFF., 2020 NAT’L POPULATION & HOUS. CENSUS 65 tbl.3.9 (2020), <https://vnso.gov.vu/index.php/en/census-and-surveys/census/2020populationhousingcensus>.

¹⁶ MINISTRY OF JUST. & CMTY. SERVS., VANUATU NAT’L CHILD PROTECTION POL’Y 2016-2026 12 (2016), https://mjcs.gov.vu/images/policy/Vanuatu_National_Child_Protection_Policy_2016-2026_FINAL_Nov16.pdf.

I. THE CREATION OF CHIEFS AND *KASTOM*

The indigenous people of the archipelago and their cultural practices go back thousands of years,¹⁷ long before the arrival of European missionaries in the mid-1800s and the colonial period that followed.¹⁸ In *long kastom*, the period before the arrival of outsiders,¹⁹ there was little interaction between the different indigenous groups, even those living on the same island, which resulted in relatively isolated communities that developed their own languages, belief systems, and traditions.²⁰ The social structure, known as the *wantok* (one talk) system, connected people through a common religion, ancestry, ethnicity, or language and bound the people to each other “through a complex web of networks and mutual obligations.”²¹ Practices and belief systems were unique to individual *wantoks*, meaning there was no common indigenous identity prior to the arrival of the missionaries and colonial powers.²² *Wantok* leadership, which conferred authority to a single person based on the so-called “big-man system,”²³ was achieved in various ways. For example, in some places in the archipelago, leadership was determined by heredity,²⁴ by “acknowledged access to and control of ritual knowledge,”²⁵ or by participation in a series of rituals (i.e., graded societies).²⁶

When the Presbyterian, and later Anglican and Catholic, missionaries began arriving in the mid-1800s, they set about converting the locals to Christianity.²⁷ The conversion process caused two significant changes in *ni-Vanuatu* daily life. First, the missionaries needed to

¹⁷ The islands are believed to have been inhabited by Melanesian people for several thousand years before 1774 when British Captain James Cook explored, mapped, and named the islands New Hebrides. Paterson, *Vanuatu*, *supra* note 10, at 365-66.

¹⁸ *See id.* at 366.

¹⁹ The *long kastom* time period is also sometimes referred to as *taem bifo* (time before). Interview with Don Paterson (Mar. 4, 2014), *supra* note 1.

²⁰ Wouter Veenendaal, *How Instability Creates Stability: The Survival of Democracy in Vanuatu*, 42 *THIRD WORLD Q.*, 1330, 1335 (2020), <https://www.tandfonline.com/doi/full/10.1080/01436597.2021.1890577>.

²¹ *Id.*

²² *See id.*

²³ *Id.*

²⁴ For example, in the southern island of Aneityum. Bolton, *Chief Willie Bongmatur Maldo*, *supra* note 14, at 181.

²⁵ For example, in Tanna. *Id.* (internal quotation omitted) (quoting BRONWEN DOUGLAS, *ACROSS THE GREAT DIVIDE: JOURNEYS IN HISTORY AND ANTHROPOLOGY* 228 (1998)).

²⁶ For example, in Ambrym. Bolton, *Chief Willie Bongmatur Maldo*, *supra* note 14, at 181.

²⁷ FORSYTH, *supra* note 10, at 2.

establish credibility and assert authority over the local population without undercutting the authority of the traditional leaders.²⁸ In an attempt to compromise, early missionaries “reconstituted [the traditional leaders] as a kind of local Parliament to consider the moral and social good of the island.”²⁹ Over time, the traditional leaders became leaders of the “redeemed community,”³⁰ marking the difference between those who converted to Christianity and those who did not. In an attempt to recreate local leadership structures similar to those in Polynesia, the missionaries described the leaders as “chiefs.”³¹ Indeed, in Bislama, the local vernacular,³² they are still referred to as *ol kastom jif* (traditional chief). This seems to be in reference to a historical practice, but in reality, the concept of “chiefs” as local leaders was introduced by missionaries and modified over time to suit various interests.³³

At the same time, in their effort to convert the local indigenous population to Christianity and abolish the former ways of living, *kastom* was envisioned as a description and category of local practices that were distinctly separate from European practices.³⁴ Most anthropologists hold that during the missionary period, *kastom* was used as a “marker of a lifestyle apart from the *skul*— the way of the mission.”³⁵ Fundamentally, *kastom* differentiated between “Christianity [which] was associated with ‘light’ and progress and *kastom* [which was associated] with ‘darkness’ and backwardness.”³⁶

²⁸ See Bolton, *Chief Willie Bongmatur Maldo*, *supra* note 14, at 182.

²⁹ *Id.* (cleaned up).

³⁰ *Id.*

³¹ See *id.*

³² *Id.* at 180. The *wantok* groups across the island had individual languages; however, Bislama, a pidgin language, grew out of their shared “black-birding” experience. For more than 40 years (1860s–1904), indigenous adult men were abducted and sent to Australia, Fiji, New Caledonia, and Samoa to work as indentured laborers on sugar plantations. As men from different *wantoks* came into contact with each other, they developed Bislama as a common language that spread across the archipelago when they returned home. See Veenendaal, *supra* note 20, at 1335.

³³ See Bolton, *Chief Willie Bongmatur Maldo*, *supra* note 14, at 182.

³⁴ FORSYTH, *supra* note 10, at 76.

³⁵ Benedicta Rousseau, *Shifting Others: Kastom and Politics at the Vanuatu Cultural Centre*, in *WORKING TOGETHER IN VANUATU* 225 (John Taylor & Nick Thieberger eds., 2011) [hereinafter Rousseau, *Shifting Others*]. The terms *skul* (school), church, and mission were used interchangeably to refer to the same place. The physical building, erected by the missionaries, established the mission site and was where both church and school, as taught by the missionaries, was conducted. Interview with Don Paterson, Emeritus Professor of L., Univ. of the S. Pac., in Port Vila, Vanuatu (Apr. 6, 2015) (on file with author).

³⁶ FORSYTH, *supra* note 10, at 76 (internal citation omitted).

The archipelago was subjected to colonial power in 1906 pursuant to the Anglo-French Condominium of the Hebrides,³⁷ but most *ni-Vanuatu* were affected by colonial power only in the most tangential way.³⁸ The primary intent of the Condominium was to establish a legal machinery to process the claims of the colonial powers while leaving the *ni-Vanuatu* to regulate their own affairs.³⁹ As a matter of administration, the Condominium government adopted the missionaries' chief model in order to organize individuals who could represent and act for their community in dealings with government.⁴⁰ This reconceptualized the role of the traditional leader, with authority and responsibility for the internal workings of a community, to a chief with authority and responsibility for representing the community to outsiders.⁴¹

Kastom, as associated with "unenlightened heathenism," carried a negative connotation until the late 1960s.⁴² Views about *kastom* began to shift, however, in the period leading up to independence in 1980.⁴³ Powerful pro-independence political parties appropriated *kastom* as the rallying cry to unite a deeply diverse national population⁴⁴ through the restoration of "traditional values."⁴⁵ It was primarily represented through masculine cultural symbols such as a pig's tusk, a cycad leaf, and a coat of arms featuring a male chief in traditional clothing.⁴⁶ In a subtle but significant shift, *kastom* came to signify the practices and characteristics that distinguished *ni-Vanuatu* from foreigners⁴⁷ rather than Christians from heathens. It was a welcome change to have *kastom* viewed in a positive light after indigenous ways

³⁷ *Id.* at 2.

³⁸ Bolton, *Chief Willie Bongmatur Maldo*, *supra* note 14, at 183.

³⁹ See LISSANT BOLTON, UNFOLDING THE MOON: ENACTING WOMEN'S KASTOM IN VANUATU 7 (2003).

⁴⁰ Bolton, *Chief Willie Bongmatur Maldo*, *supra* note 14, at 183.

⁴¹ *See id.*

⁴² Lissant Bolton, *Radio and the Redefinition of "Kastom" in Vanuatu*, 11 THE CONTEMP. PAC. 335, 341 (1999) [hereinafter Bolton, *Radio*].

⁴³ FORSYTH, *supra* note 10, at 76.

⁴⁴ *Id.* at 76-77; *see also* Veenendaal, *supra* note 20, at 1335 (explaining that because isolated communities developed unique languages and practices, no "one" *kastom* developed).

⁴⁵ Tait Brimacombe, *Trending Trousers: Debating Kastom, Clothing and Gender in the Vanuatu Mediascape*, 17 ASIA PAC. J. ANTHROPOLOGY 17, 19 (2016).

⁴⁶ John P. Taylor, *Janus and the Siren's Call: Kava and the Articulation of Gender and Modernity in Vanuatu*, 16 J. OF THE ROYAL ANTHROPOLOGICAL INST. 279, 287 (2010) [hereinafter Taylor, *Janus and the Siren's Call*].

⁴⁷ Bolton, *Radio*, *supra* note 42, at 350.

had been derided for more than a century.⁴⁸ At the same time, focusing on that which was indigenous, rather than non-Christian, helped to smooth over conflicts between *kastom* and Christianity such that the two became “conjoined in the nationalist rhetoric.”⁴⁹ There is a general consensus that “*kastom* was selectively recuperated in the interests of forging a national identity”⁵⁰ and in rejection of foreign interests. As a rallying point, however, *kastom*’s utility “depend[ed] heavily on its confinement to an ideological level, indivisible and unexamined.”⁵¹

In 1974, in an effort to appease the momentum building towards independence and formal recognition of the authority of chiefs, the Condominium government established a national Representative Assembly which included four chiefs “to represent custom.”⁵² Appointing chiefs to the Assembly did two critical things. First, it elevated their status to a national level.⁵³ Second, it officially conflated chiefs and *kastom*.⁵⁴ As a consequence, not only were chiefs speaking to outsiders on behalf of their communities, they were doing so as acknowledged experts of *kastom*.⁵⁵ Concerns about the effect on political majorities by appointment of chiefs to the Assembly led to disputes about who was eligible for election, essentially crippling the Assembly.⁵⁶ As a compromise, the Council of the Chiefs was established as a separate body to advise the Assembly on all matters concerning *kastom* but would have no effect on the make-up of the Assembly.⁵⁷

At independence, the new constitution did not make explicit provisions for chiefs. Instead, the constitution established the Council of Chiefs, known as the *Malvatumauri*,⁵⁸ which is comprised of chiefs

⁴⁸ See Rousseau, *Shifting Others*, *supra* note 35, at 225.

⁴⁹ See Brimacombe, *supra* note 45, at 19.

⁵⁰ See, e.g., *id.*; Benedicta Rousseau, “*This is a Court of Law, Not a Court of Morality*”: *Kastom and Custom in Vanuatu State Courts*, 12 J. S. PAC. L. 15, 15-16 (2008) (describing early discussions of *kastom* as the “invention of tradition”).

⁵¹ FORSYTH, *supra* note 10, at 77.

⁵² Bolton, *Chief Willie Bongmatur Maldo*, *supra* note 14, at 185.

⁵³ *Id.*

⁵⁴ *Id.* (arguing that this conflation is so “taken for granted in Vanuatu today that it is hard to unpick”).

⁵⁵ See *id.*

⁵⁶ See *id.* at 186, 188-89.

⁵⁷ *Id.* at 190.

⁵⁸ Chief Willie Bongmatur Maldo, the first President of the Vanuatu National Council of Chiefs, explained how the name for the Council of Chiefs was chosen, saying, “*Mal* means chief.

from every region of Vanuatu and who are elected to four-year terms.⁵⁹ The Council has "a general competence to discuss all matters relating to land, custom and tradition and may make recommendations for the preservation and promotion of *ni-Vanuatu* culture and languages."⁶⁰ Its primary role is to advise Parliament. The Council may be consulted on "any question, particularly any question relating to land, tradition, and custom, in connection with any bill before Parliament."⁶¹ Additionally, the Council actively advocates for greater and more formalized integration of custom in the state law system.⁶²

II. CONTEMPORARY INTERPRETATION OF *KASTOM* AND THE COURTS

The evolution and repackaging of diverse non-Christian indigenous practices and beliefs systems across people who shared neither language nor kinship into a homogenous *kastom* system is, in some ways, a masterful sleight of hand trick. In the 40 years since independence, *kastom* has come to be understood as a generic reference to shared traditional knowledge and practices. This is reflected in the Interpretation Act of Vanuatu which broadly defines "custom"⁶³ as "the custom and traditional practices of the indigenous peoples of Vanuatu."⁶⁴ *Kastom* is now used as shorthand for "what the *ni-Vanuatu* understand to belong to themselves and to their place."⁶⁵

The contemporary interpretation of *kastom*, however, depends on several key mutations that are largely glossed over. First, in *long kastom*, "difference" was understood as between indigenous groups, whereas in contemporary interpretation "difference" is understood as between *ni-Vanuatu* and everyone else.⁶⁶ Second, Christian principles, including traditional gender roles, were initially understood as

Vatu means stone or island or place. *Vatu* means stone because in the past when they ordained chiefs, they sat down or stood upon [took authority from] stones. That is why we chose *malvatu*. *Mauri* means something which is alive, which grows, which grows in the light." Bolton, *Chief Willie Bongmatur Maldo*, *supra* note 14, at 190.

⁵⁹ FORSYTH, *supra* note 10, at 162.

⁶⁰ VANUATU CONST., chp. 5, art. 30(1).

⁶¹ VANUATU CONST., chp. 5, art. 30(2).

⁶² See FORSYTH, *supra* note 10, at 162.

⁶³ The Vanuatu Constitution uses the English spelling.

⁶⁴ Interpretation (Amendment) Act, 1981, § 2 (Act. No. 9/1981) (Vanuatu).

⁶⁵ Bolton, *Chief Willie Bongmatur Maldo*, *supra* note 14, at 179.

⁶⁶ See Bolton, *Radio*, *supra* note 42, at 350.

something to which the *ni-Vanuatu* belonged; the contemporary interpretation has flipped that in the sense that Christianity is now seen as something that belongs to the *ni-Vanuatu*.⁶⁷ The repackaging of *kastom* has been very useful in some contexts, particularly as a rallying cry for independence⁶⁸ and as a marketing tool for tourism.⁶⁹ *Kastom*, intertwined with conservative religion, is also used to coerce behavior, victimize vulnerable populations, and exclude some community members, primarily women and children, from full participation in community affairs.⁷⁰

Vanuatu has a four-tier court system. The highest level, the Court of Appeal, is made up of two or more Supreme Court Justices sitting together and hears appeals from the Supreme Court.⁷¹ The Supreme Court, comprised of a Chief Justice and three other Justices, is a court of general jurisdiction.⁷² The historical practice has been that the Court of Appeal and Supreme Court Justices are either expatriates from Australia and New Zealand or Pacific islanders who completed their legal education elsewhere in a common law jurisdiction.⁷³ The Court of Appeal and the Supreme Court are in the capital city of Port Vila on the island of Efate.⁷⁴ In the Magistrates' Court, the magistrates are usually *ni-Vanuatu* and most, but not all, have law degrees.⁷⁵ The Chief Justice may establish Island Courts as neces-

⁶⁷ See FORSYTH, *supra* note 10, at 11.

⁶⁸ See *id.*

⁶⁹ See *8 Ways to Experience Local Culture & Kastom*, VANUATU TOURISM OFFICE, <https://www.vanuatu.travel/au/8-ways-to-experience-local-culture-kastom> (last visited Jan. 3, 2023); *Kastom Village Tours*, FODOR'S TRAVEL, <https://www.fodors.com/world/australia-and-the-pacific/vanuatu/things-to-do/sights/reviews/kastom-village-tours-584533> (last visited Feb. 12, 2023).

⁷⁰ Author's observation based on field research.

⁷¹ VANUATU CONST., chp. 8, art. 50.

⁷² VANUATU CONST., chp. 8, art. 49.

⁷³ See Natalie Bard, *Judges as Cultural Outsiders: Exploring the Expatriate Model of Judging in the Pacific*, 19 CANTERBURY L. REV. 80, 80 (2014). The expatriate make-up and/or training of the court is often criticized. Forsyth, *supra* note 2, at 432 (arguing that the "increasing number of common-law trained lawyers engaged as judges and practitioners in Pacific Island legal systems, have ensured that the persistent erosion of the vitality of customary law has continued, even increased in tempo"). The Supreme Court has also commented, noting that "[o]ne need only to consider the fact that virtually all of the country's lawyers, including the *ni-Vanuatu* lawyers are common law trained" as a partial explanation for the absence of deeper integration of custom in state law. *Bango v. Waiwo*, (1996) VUSC 5 [Supreme Court] (Vanuatu).

⁷⁴ See, e.g., Tess Newton Cain, *Precarious Moment: Vanuatu Court to Rule on Prime Minister's Fate*, THE GUARDIAN (July 7, 2021, 11:12 P.M.), <https://www.theguardian.com/world/2021/jul/08/precious-moment-vanuatu-court-to-rule-on-prime-minister-bob-loughman-fate>.

⁷⁵ FORSYTH, *supra* note 10, at 139.

sary.⁷⁶ Where Island Courts exist, the Justices are typically local chiefs or respected elders who rarely have a formal legal education and are appointed on the basis that they are “knowledgeable in custom for each island court.”⁷⁷ Island Courts are courts of general jurisdiction and “administer customary law prevailing within the territorial jurisdiction of the court so far as the same is not in conflict with any written law and is not contrary to justice, morality and good order.”⁷⁸ Finally, there are Customary Land Tribunals which have authority to hear only customary land disputes.⁷⁹

Additionally, disputes⁸⁰ can be settled by the local chiefs.⁸¹ Indeed, the majority of disputes that involve only *ni-Vanuatu* are settled in this way.⁸² When a chief settles a dispute, it is not always entirely clear whether he is acting in his capacity as a chief or in his capacity as an Island Court Justice.⁸³ Either way, the chief will typically hold a meeting between the parties and, sometimes, the wider community.⁸⁴ The parties will each explain the dispute from their perspective, and some community members may be asked to comment.⁸⁵

⁷⁶ See Island Courts Act, 1983, § 1 (Act No. 10/1983) (Vanuatu).

⁷⁷ *Id.*

⁷⁸ About the Island Court, JUDICIARY OF THE REPUBLIC OF VANUATU (last accessed Dec. 22, 2022) <https://courts.gov.vu/about-us/island-court>.

⁷⁹ Customary Land Tribunal Act, 2001 (Act No. 7/2001) (Vanuatu).

⁸⁰ There is no one term for non-state dispute resolution; descriptions include “sitting down in the *nakamal* or *nasara*,” “straightening” a conflict, or “giving” the conflict to the chief. FORSYTH, *supra* note 10, at 95.

⁸¹ “[I]t is evident from some of the judgments that the perception of victims and offenders is that the customary settlement is the final resolution of the situation, with the court case being considered superfluous and sometimes unwelcome.” See Tess Newton Cain, *Convergence or Clash? The Recognition of Customary Law and Practice in Sentencing Decisions of the Courts of the Pacific Island Region*, MELBOURNE J. INT’L L. 48, 59 (2001) [hereinafter Cain, *Convergence or Clash*]. Moreover, the state system is viewed by the community as an option less attractive than the customary practices, which are more often familiar and believed to be more efficient, accessible, culturally legitimate, and fair. See also Forsyth, *supra* note 2, at 435-36 (referencing a study by the Vanuatu Juvenile Justice Project that found *ni-Vanuatu* youth prefer to have their disputes settled by the chiefs instead of the police and/or court system because “they don’t always understand the white man’s court system” and the police are often “brutal” to them).

⁸² Some have argued that the *kastom* system of diverting disputes from the state courts is critical to keeping the number of state cases to a manageable number. Additionally, in the absence of the *kastom* system, significantly more state judges and lawyers associated with public offices would be necessary. Finally, the *kastom* system can address and resolve minor disputes before the situation becomes a criminal matter. FORSYTH, *supra* note 10, at 149.

⁸³ Interview with Don Paterson (Mar. 4, 2014), *supra* note 1.

⁸⁴ *Id.*

⁸⁵ One chief explained that letting everyone “have their say” is important because the idea of “justice” includes the opportunity to voice your grievance. FORSYTH, *supra* note 10, at 101.

The process is less concerned with substantive rules and focuses instead on achieving and maintaining order in a way that reflects community-based principles related to interpersonal relationships.⁸⁶ In the end, the chief settles the dispute, whether by requiring the parties to make formal apologies in a reconciliation ceremony or some sort of payment in compensation,⁸⁷ sometimes fining both parties.⁸⁸ Parties who are unhappy with the chief's decision can appeal the decision up through the chief system.⁸⁹ Alternatively, they can press their claims in the Magistrates' Court.⁹⁰

The role and weight of custom in the formal state court system is often debated. Custom is specifically referenced in the formal written law. For example, Article 95(2) of the Vanuatu Constitution, which addresses the continued post-independence validity of colonial-era legislation, provides that "[u]ntil otherwise provided by Parliament, the British and French laws in force or applied in Vanuatu immediately before the Day of Independence shall on and after that day continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu *and wherever possible taking due account of custom.*"⁹¹ Further, Article 95(3) explicitly provides that "[c]ustomary law shall continue to have effect as part of the law of the Republic of Vanuatu."⁹²

On the other hand, the Constitution also arguably minimizes the practical role of custom in state courts. Article 47(1) provides that the judiciary shall "resolve proceedings according to law," but where there is "no rule of law applicable to the matter before it, a court shall determine the matter according to substantial justice and *whenever possible in conformity with custom.*"⁹³ The explicit language of the

⁸⁶ Guy Powles, *The Common Law at Bay? The Scope and Status of Customary Law Regimes in the Pacific*, 21 J. PAC. STUDIES 61, 64 (1997) [hereinafter Powles, *The Common Law at Bay*].

⁸⁷ FORSYTH, *supra* note 10, at 103. The terminology used to describe this payment varies. In some places it is referred to as *kastom faen* (fine), and in other places it is referred to as a *kastom* settlement or a *kastom* compensation. *Id.*

⁸⁸ *Id.* Generally, a dispute between two people is also seen as a disturbance in the community. *Id.* at 106. Accordingly, both parties are responsible for the disturbance and should both be punished.

⁸⁹ *Id.* at 111-12.

⁹⁰ Interview with Chief Edwin Olong, in Port Vila, Vanuatu (Feb. 27, 2015); see also Forsyth, *supra* note 2, at 434 (describing the chiefly process as the "first stop").

⁹¹ VANUATU CONST., chp. 15, art. 95(2) (emphasis added).

⁹² VANUATU CONST., chp. 15, art. 95(3).

⁹³ VANUATU CONST., chp. 8, art. 47(1) (emphasis added).

Constitution prioritizes “substantial justice” over custom by relegating adherence to custom to “whenever possible.”⁹⁴ This would seem to be a strong indication that where custom is inconsistent with “substantial justice,” it need not be “taken into account.” As described by one island judge, it is not entirely clear whether “the constitution and statutes . . . opened doors, or set hurdles for the application of custom”⁹⁵ A related issue is whether “customary law” as used in Article 95(3) is meant to be something different from “custom” as used in Article 47(1).⁹⁶

Arguably the clearest example⁹⁷ of how custom is “taken into account” by state courts is through the Penal Code (Amendment) Act 2006.⁹⁸ In the context of criminal sentencing, Section 38 provides that a court may “promote reconciliation and encourage and facilitate the settlement according to custom or otherwise, for an offence, [sic] on terms of payment of compensation or other terms approved by the court.”⁹⁹ Further, Section 39 requires the court, when sentencing an offender, to “*take account of any compensation or reparation made or due by the offender under custom*”¹⁰⁰ In this way, reconciliation payments are essentially considered in mitigation.

The classic example of how this occurs in practice in a criminal proceeding is described by the court in *Waiwo v. Waiwo and Banga*.¹⁰¹

[V]ery often, the Magistrate will not be surprised to see appearing before the court . . . next to the Accused, his custom chief. The chief pays respect to the bench and informs the Court that they have already dealt with the matter in custom and the Defendant or Accused is already punished for his wrongdoing The Court explains to the

⁹⁴ See *id.*

⁹⁵ Guy Powles, *Overview: The Status of Customary Law: Achievements and Prospects*, 2011 N.Z. Y.B. OF N.Z. JURIS. 238, 247.

⁹⁶ See VANUATU CONST., chp. 15, §§ 47(1), 95(3).

⁹⁷ The second most commonly cited example is the Custom Land Management Act of 2013. At Vanuatu’s impendence in 1980, title to all land was returned to custom owners, but colonial land laws were retained. Sue Farran & Jennifer Corrin, *Developing Legislation to Formalise Customary Land Management: Deep Legal Pluralism or a Shallow Veneer?*, L. DEV. REV. DEC. 2017, at 1. The Custom Land Management Act 2013 established the new legal framework, based on *kastom*, with respect to title to, and management of, customary land. *Id.* at 7.

⁹⁸ Penal Code (Amendment) Act, 2006 (Act No. 25/2006) (Vanuatu).

⁹⁹ *Id.*

¹⁰⁰ *Id.* (emphasis added).

¹⁰¹ FORSYTH, *supra* 10, at 148 (citing *Waiwo v. Waiwo & Banga* (1996) VUMC 1 [Magistrate Court] (Vanuatu) (overturned by VUMC 5)).

chief concerned the position within the criminal law, the Accused is dealt with accordingly and the Court invites the chiefs to explain the custom. Obviously the court [does] take into account the customary settlement, compensation and punishment . . . as a mitigating factor when considering the sentencing of the Accused.¹⁰²

How then, exactly, are courts to treat customary payments for purposes of mitigation? The Court of Appeal has made it clear that “[s]ection 119 is relevant to an assessment of the quantum of the sentence and not the nature of the sentence. It can influence the length of a sentence of imprisonment or the amount of a fine, but *not* its fundamental nature.”¹⁰³ Accordingly, a customary payment will not convert a custodial sentence into a non-custodial sentence. The correct calculation with respect to a reduction in penalties was the source of confusion and inconsistency for a time.¹⁰⁴ At one point, there seemed to be a tendency of some courts to reduce a custodial sentence by one-third when there had been a reconciliation ceremony and the defendant had made a custom payment.¹⁰⁵ However, in *Public Prosecutor v. Niala*, the court clarified the issue and instructed that such a “precise mathematical deduction” was inappropriate.¹⁰⁶

III. KASTOM ADOPTIONS OF CHILDREN¹⁰⁷

Children in Vanuatu can be adopted in state courts pursuant to the Adoption Act.¹⁰⁸ Far more often, however, children are adopted

¹⁰² *Waiwo*, (1996) VUMC 1 (cleaned up).

¹⁰³ *Public Prosecutor v. Gideon*, (2002) VUCA 7 [Court of Appeal] (Vanuatu).

¹⁰⁴ See Don Paterson, *Customary Reconciliation in Sentencing for Sexual Offences: A Review of Public Prosecutor v. Ben and Others and Public Prosecutor v. Tarilingi and Gamma*, 10 J. S. PAC. L. (2006) (discussing the “considerable divergence of practice within the Courts as to the weight that should be given to a customary reconciliation”) [hereinafter Paterson, *Customary Reconciliation*].

¹⁰⁵ See *Public Prosecutor v. Georges*, (2004) VUSC 68 [Supreme Court] (Vanuatu); *Gideon*, (2002) VUCA 7; see also Paterson, *Customary Reconciliation*, *supra* note 104.

¹⁰⁶ *Public Prosecutor v. Niala*, (2004) VUCA 25 [Court of Appeal] (Vanuatu).

¹⁰⁷ For purposes of clarity, this article uses “state adoption” or “statutory adoption” in reference to formal court ordered adoptions. Alternatively, “*kastom* adoption” refers to informal adoptions authorized by Chiefs. “Reallocation” is used to distinguish between *kastom* adoptions that are granted solely because they are in a child’s best interest and other *kastom* adoptions which are granted for other reasons.

¹⁰⁸ Adoption Act 1958, 7 Eliz. 2 c. 5, § 13 (U.K.) [hereinafter Adoption Act (U.K.)]; CIVIL CODE [C. CIV] [CIVIL CODE] (Fr.). These are collectively referred to as the Adoption Acts. Vanuatu still relies on the pre-independence Adoption Act of 1958 as the law applied to adop-

in *kastom* as ordered by chiefs acting as Village Court Justices or in their private capacity as chiefs.¹⁰⁹ It is important to note that chiefs will employ *kastom* law regardless of whether the adoption is done through the Village Court or privately.¹¹⁰ Like state adoptions pursuant to the Adoption Acts,¹¹¹ *kastom* adoptions entail the relinquishment of a child by birth parent(s) to adoptive parent(s) with the intent to create a new family structure. *Kastom* adoptions differ, however, from state adoptions in several key ways.

First, unlike the permanency around termination of birth parents' rights in a state adoption, *kastom* adoptions do not always require, or even contemplate, such a severance.¹¹² The new arrangement is sometimes thought to be more akin to fostering¹¹³ or guardianship than a traditional adoption. *Kastom* adoptions that stop short of the permanency envisioned by state adoptions achieved through formal termination of the birth parent's rights and the creation of new parental rights in the adoptive parents are generally viewed as an asset of the *ni-Vanuatu* culture and a necessity in a country with a limited state welfare system.¹¹⁴

Second, unlike state adoptions pursuant to statute in the state court system, the circumstances surrounding the creation of *kastom*

tions. See Jennifer Corrin & Sue Farran, *The Law of Adoption in Vanuatu*, in *THE PLURAL PRACTICE OF ADOPTION IN PACIFIC ISLAND STATES* 147, 150-51 (Jennifer Corrin & Sue Farran eds., 2019) [hereinafter Corrin & Farran, *The Law of Adoption*].

¹⁰⁹ Interview with Don Paterson (Mar. 4, 2014), *supra* note 1.

¹¹⁰ *Id.*

¹¹¹ See Adoption Act (U.K.).

¹¹² Corrin & Farran, *The Law of Adoption*, *supra* note 108, at 155. Likewise, the customary adoption practices in many Native American communities do not require the legal termination of (birth) parent rights. See Anita Fineday, *Customary Adoption at White Earth Nation*, *CULTURALLY RESPONSIVE CHILD WELFARE PRACT.*, Winter 2015, at 29. While those customary adoptions have long been recognized in the Native American communities, there is a growing movement for state courts to recognize them as well. For example, Oregon's House of Representatives recently passed legislation which permits state courts to recognize customary adoptions without requiring the termination of parental rights. S. 562, 81st Legis. Assemb. (Or. 2021).

¹¹³ Corrin & Farran, *The Law of Adoption*, *supra* note 108, at 156.

¹¹⁴ See Steven Ratuva, *Back to Basics: Towards Integrated Social Protection for Vulnerable Groups in Vanuatu*, 25 *PAC. ECON. BULL.* 40, 47-54 (2020) (providing an overview of social welfare programs in Vanuatu and how customary social protection systems are used to support vulnerable groups). State child welfare systems, in conjunction with state court systems, are charged with investigating allegations of child abuse, neglect and/or dependency and making provisions for children in need. In the absence of such systems, it is commonly accepted that the informal *kastom* adoption process is both a necessary alternative and a unique aspect of *ni-Vanuatu* culture that achieves some degree of permanency and stability for children. Field notes on file with author.

adoptions differ depending on the local *kastom* of the people involved.¹¹⁵ As a starting point, the conduct required varies. It can be a “relatively informal process unfettered by strict statutory rules and procedures”¹¹⁶ For example, a child sometimes belongs to the person who names him, but at other times, more is required of the adoptive parent than naming the child including, ceremonies, pig-killing, and customary drinking of kava.¹¹⁷ Likewise, the location of the event can vary. In many places, *kastom* adoptions are created during a public ceremony in the *nakamal* (meeting house) but in other places the ceremony is conducted privately.¹¹⁸ The practice of gift-giving also varies. Gifts between the birth parents and the adopting parents may or may not be exchanged depending on local *kastom*.¹¹⁹

Third, the legal consequences of a customary adoption generally differ from state adoptions, particularly with respect to inheritance and land rights,¹²⁰ and vary further depending on whether the child is male or female.¹²¹ For example, in some places adopted children inherit from their adoptive parents, but will not inherit from their birth parents.¹²² Alternatively, in other places the children inherit from their adoptive parents and their birth parents.¹²³ In still other places, the children will inherit from the adoptive parents and their birth parents if the birth parents allow it.¹²⁴ Finally, in some places children will inherit from their birth father, but will only inherit from the adoptive father if the adoptive father’s oldest birth son permits it.¹²⁵

¹¹⁵ Corrin & Farran, *The Law of Adoption*, *supra* note 108, at 156.

¹¹⁶ Kenneth Brown, *Customary Rules and the Welfare Principle: Post-Independence Custody Cases in Solomon Islands and Vanuatu*, 21 J. PAC. STUD. 83, 97 (1997).

¹¹⁷ Corrin & Farran, *The Law of Adoption*, *supra* note 108, at 156.

¹¹⁸ *Id.* at 160-61.

¹¹⁹ Common gifts include woven mats, pigs, chickens and *lap lap* (a fish casserole cooked in a traditional fire pit). *Id.* at 160.

¹²⁰ Sue Farran, *Child Adoption: The Challenges Presented by the Plural Legal Systems of South Pacific Islands*, 21 CHILD & FAM. Q. 462, 475 (2009) [hereinafter Farran, *Challenges*].

¹²¹ Corrin & Farran, *The Law of Adoption*, *supra* note 108, at 162.

¹²² This is the common practice in West Ambae, parts of the Shepards group, West Tanna, Futuna, Mota Island, and Erromango Island. *Id.*

¹²³ It is the most common in Paama, North Ambrym, South Ambae, East Ambae, and Mota Lava. *Id.*

¹²⁴ This mostly occurs on Gaua Island. *Id.* at 163.

¹²⁵ This is most common in central Pentecost. *Id.*

A. *Kastom Adoptions in a Child's Best Interest*

Consistent with Western ideas of adoption, some *kastom* adoptions are undertaken in a child's best interest. Under this form of *kastom* adoption, the needs or desires of third parties are irrelevant.¹²⁶ The hallmark of such adoption is that it is in the best interest of the child—to provide parents for children who have none, or to provide children with circumstances believed to be better.¹²⁷ Adoption, in its "purest" form, whether through the state court system or the *kastom* system, is not intended for the benefit of anyone other than the child.¹²⁸

B. *Kastom Adoptions for the Benefit of Third Parties – Reallocations*

In contrast, the majority of *kastom* adoptions are undertaken expressly because they are to the benefit of a third party. However, while these arrangements are described as "*kastom* adoptions," the practice of using children as assets to be re-assigned for the benefit of a third party is not an adoption.¹²⁹ More accurately, this practice is a reallocation of assets.¹³⁰ When children, like pigs and mats, both highly prized in *ni-Vanuatu* society, are used as payment in fulfillment of debt obligations, or to secure some other tangible benefit to a third party, the reallocation is in the interest of the third party, not the

¹²⁶ Because customary adoptions are generally not recorded, it is nearly impossible to gather statistics.

¹²⁷ Certainly, there are distinctions to be made between the circumstances of children who are voluntarily placed for adoption by birth parent(s) and children who are removed from abusive and/or neglectful parents by state authorities and subsequently placed for adoption. Even so, in either case, the guiding principle is that the adoption must be in the best interest of the child.

¹²⁸ It is true that the adoptive placement of a child can be to the "benefit" of a biological parent in some cases. For example, a mother who believes she is unable, or is unwilling, to care for a child "benefits" by no longer having the responsibility for the child when the child is placed with others. Still, though, the primary benefit is to the child because it is never in a child's best interest to be raised grudgingly by parent(s) who would rather not.

¹²⁹ See Joan Heifetz Hollinger, *The Uniform Adoption Law*, 5 THE FUTURE OF CHILD. 205, 206 (1995) (discussing the modern definition of adoption); Elizabeth S. Cole & Kathryn S. Donley, *History, Values, and Placement Policy Issues in Adoption*, in THE PSYCHOLOGY OF ADOPTION 273-74 (David M. Brodzinsky & Marshall D. Schechter eds., 1990) (discussing adoption as a social, not property, phenomenon).

¹³⁰ Where a third party benefits from a *kastom* adoption, "reallocation" is used in place of "adoption."

child. Vanuatu's official position, as reported to the Committee on the Rights of the Child in its Second Periodic Report in 2017, is that it has abolished the *kastomary* practice of exchanging children in this way.¹³¹ Anecdotal evidence suggests otherwise—this practice is still common and widespread, but is rarely documented or brought before the attention of government officials.¹³² The circumstances and specific benefit to third parties differ, but the benefits can be loosely grouped into three categories: (1) for purposes of compensation or restitution; (2) for purposes of swapping or replacing someone; and (3) for purposes of mitigation in criminal sentencing.

1. Reallocation as Compensation or Restitution

Ni-Vanuatu rarely take each other to court over civil matters.¹³³ Instead, private disputes are more often settled by chiefs at the local level.¹³⁴ Where one party harms another, a chief will likely order

¹³¹ Following submission of its State Party Report, the Committee on the Rights of the Child requested additional information with respect to “the measures taken to prevent and prohibit harmful traditional practices against children, including child marriage and practices involving the exchange of children, especially girls, as compensation.” Committee’s Information Request (on file with author). In its Reply to the Committee, Vanuatu stated that *PP v. Kua* and *PP v. Nawia* “had set the deterrence effect of the Rule of law and stigmatized the customary practice. *Id.* It recognition of the right of the child under the Constitution and the CRC as invoked by the Courts in these two cases has set the benchmark and acceptable practice that exchange of children in relation reconciliation is not acceptable norm under the rule of law.” *Id.* Further, “the notion of the compensation in exchanging children between parties as a part of some customary practice in Vanuatu has been stigmatized as one of the customary practices as unacceptable under the rule of law. This customary norm has now been ceased for the past three years, since the Government and communities have realized the rights of children.” Reply to the Committee (on file with author).

The Committee on the Rights of the Child also commented on the practice in its Concluding Observations on the Report Submitted by Vanuatu under Article 12(1) of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography: “The harmful customary practice of exchanging children between tribes for the purpose of keeping peace in the community has still not criminalized, despite recent court decisions . . .” U.N. COMM. ON THE RTS. OF CHILD., CONCLUDING OBSERVATIONS ON THE REP. SUBMITTED BY VANUATU UNDER ARTICLE 12(1) OF THE OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE SALE OF CHILDREN, CHILD PROSTITUTION, AND CHILD PORNOGRAPHY (2017).

¹³² UNICEF, SITUATION ANALYSIS OF CHILDREN IN THE PACIFIC ISLAND COUNTRIES 145 (2017) (noting that “customary practices still result in children sometimes being exchanged or given as reparation during the resolution of a conflict”).

¹³³ See Cain, *Convergence or Clash*, *supra* note 81, at 49 (noting that people in Pacific Island communities generally seek out local chiefs to resolve disputes, although it is rarely documented).

¹³⁴ Llewellyn M. Toulmin, *The Female Chiefs of Vanuatu*, 1 ASIA PAC. J. RSCH. 30, 32 (2017) (noting that as much as 90 percent of crimes, land disputes, domestic violence, and violent

some sort of reconciliation ceremony and restitution.¹³⁵ A reconciliation ceremony is a public display of apology and forgiveness by the parties and a showing by the greater community that the offender has been forgiven and welcomed back into the community.¹³⁶ The payment, generally in the form of goods such as pigs, mats, shells, or crops, is intended to compensate the victim for their loss.¹³⁷

When the injury is considered especially serious, the payment is most often in the form of a young girl.¹³⁸ For example, after a woman lost her arm during an attack by a neighboring man, the chief ordered the offender to pay “restitution” to the victim. The restitution was the offender’s niece who would be “adopted” in *kastom* by the victim’s family.¹³⁹ Due to the victim’s loss of her arm, the child was intended to assume the physical work of the victim’s household.¹⁴⁰ The reallocation of the child was not concerned with her best interests. Instead, the point of the reallocation was to compensate the victim for the loss of her arm and her inability to continue cooking, cleaning, and performing other household chores.

2. Reallocation as Child-Swapping

A second form of reallocation is a practice generally referred to as “child swapping.” Child swapping, in the narrowest sense, is an uncommon historical practice in which two or more tribes exchanged children as a way to settle disputes and build alliances.¹⁴¹ In 2011, for example, two tribes on Tanna made international headlines when they exchanged a seven-year-old girl for a young boy to settle a land dispute lasting over 20 years.¹⁴² The chiefs had turned to the “traditional

crimes against women and children are resolved not by the court system, but by chief-ordered restitution).

¹³⁵ Interview with Don Paterson (Mar. 4, 2014), *supra* note 1.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Interview with Ruby S., in Port Vila, Vanuatu (Oct. 25, 2014) (on file with author). Interviewee’s identity kept confidential at her request.

¹⁴⁰ *Id.*

¹⁴¹ See Bonnie Malkin, *Warring Pacific Tribes Swap Children to End Dispute*, INDEPENDENT.IE (Aug. 25, 2011, 4:48 A.M.), <https://www.independent.ie/world-news/asia-pacific/warring-tribes-swap-children-to-end-dispute-26764697.html> (describing the practice of swapping children to settle long-running disputes as something that happens from “time to time”).

¹⁴² *Id.*

way” to manage conflict and avoid violence and to “build a bridge between the two tribes and to make the relationship stronger.”¹⁴³

Reallocation of children as replacements, or substitutions, for others is a more common version of child swapping. Reallocations are sometimes brokered in this way to acquire a child of the desired gender¹⁴⁴ or child laborers,¹⁴⁵ or a child might be “given away” to another family as a replacement for someone who died¹⁴⁶ or as a replacement for someone who married and left the community.¹⁴⁷ For example, in *Public Prosecutor v. Andrew Kuau and Theresa Sasia*,¹⁴⁸ the court addressed child swapping as a form of reallocation. *Kuau* involved a husband who, with the help of his wife, sexually assaulted their sixteen-year-old niece on multiple occasions, resulting in the young girl becoming pregnant.¹⁴⁹ The victim was the defendants’ niece and had been adopted by them in *kastom*.¹⁵⁰

The defendants pled guilty to Sexual Intercourse with a Child Under Care or Protection.¹⁵¹ At sentencing, the court considered the fact that both defendants pled guilty and were first-time offenders.¹⁵² The court also considered that both defendants had performed a “*kastom* reconciliation ceremony” with the victim¹⁵³ and intended to per-

¹⁴³ *Id.*

¹⁴⁴ One interviewee explained her experience: “J” and her husband had three sons and wanted a daughter. She explained that her desire for a daughter was partly “motherly,” but also because she wanted assistance with housework. She recognized that her sons would leave home at some point in the future, but she believed that a daughter could be counted on to “remain close and help.” Her husband, as the eldest of his siblings, claimed the right to demand a child from a younger brother. At aged 13 months, the little girl, “R,” was brought from a small rural island to live with J’s family. The initial transition was difficult for the child, but things improved over time. When R was almost seven years old, J gave birth to a baby girl. When the baby turned three, J and her husband decided they no longer “needed” R and sent her back to the small island. Interview with Joyce W., in Port Vila, Vanuatu (Oct. 25, 2014) (on file with author). Interviewee’s identity kept confidential at her request.

¹⁴⁵ Corrin & Farran, *The Law of Adoption*, *supra* note 108, at 162.

¹⁴⁶ Malkin, *supra* note 141.

¹⁴⁷ *Public Prosecutor v. Kuau & Sasia*, (2010) VUSC 8 [Supreme Court] (Vanuatu).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Penal Code (Amendment) Act, 2003 (Act No. 17/2003) (Vanuatu) (prohibits a person from having sexual intercourse with any child, other than a spouse, including a child who lives with the person as a stepchild, ward, or family member).

¹⁵² *Kuau & Sasia*, (2010) VUSC 8.

¹⁵³ During the *kastom* reconciliation ceremony, at the community *nakamal* (meeting place) and in the presence of the chiefs and community, the defendants gifted the victim with two pigs, a rooster, and three bundles of kava. *Id.*

form another with the victim's birth parents at a future date.¹⁵⁴ Additionally, in light of the defendants' role as adoptive parents who had failed "in their responsibility to care, protect, educate and love" the victim, the court considered aggravating factors, including breach of trust, night-time occurrence of the offense, the victim's loss of her virginity, the repeated offenses, and the victim's resulting pregnancy.¹⁵⁵ The court sentenced Kuau to four years in prison and his wife to two years in prison.¹⁵⁶

The court also took the opportunity to comment on the *kastom* practice of child swapping. It noted that "customary adoption is a sort of Tanna custom arrangement to swap or replace [sic] female."¹⁵⁷ In this case, the victim's parents had swapped her to replace her mother who was from Kuau's family.¹⁵⁸ Invoking national and international law, the court warned:

There will come a time when the courts will say something on the customary societal . . . rational of such a practice of swapping of female children and in particular in the light of . . . the fundamental rights contained in Article 5 of the Constitution and the Convention on the Rights of the Child (CRC) to which Vanuatu has ratified.¹⁵⁹

Notwithstanding the fact that the court condemned the practice more than ten years ago, the practice of swapping and replacement of children continues. For example, as teenage Lenore¹⁶⁰ explained, she was sent from her village in Ambrym to the capital city in 2018 at age nine, as a replacement for a boy who drowned while visiting family on Ambrym.¹⁶¹ Although the drowning was an accident, the chief deter-

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ The prosecution had recommended a sentence of two years for both defendants. *Id.* Instead, the court sentenced Kuau to three years and increased it by an additional three years to reflect the aggravating factors, but then reduced it by two years in mitigation for a total of four years. *Id.* The court sentenced Sasia to three years without aggravating factors, and reduced it by one year in mitigation for a total of two years. *Id.* The court declined to suspend Kuau's sentence, but suspended Sasia's sentence for two years and required her to complete 300 hours of community work. *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Public Prosecutor v. Kuau and Sasia, (2010) VUSC 8 [Supreme Court] (Vanuatu).

¹⁵⁹ *Id.*

¹⁶⁰ Interview with Lenore H., in Port Vila, Vanuatu (Dec. 15, 2012) (on file with author). Interviewee's identity kept confidential at her request.

¹⁶¹ *Id.*

mined that Lenore's parents should have been paying more attention to the children and ordered Lenore sent to the boy's parents as a replacement for their deceased son.¹⁶²

3. Reallocation as Mitigation

The reallocations most likely to come before the attention of the courts are in criminal cases in which a convicted defendant asks the court to consider reconciliation payments, which include children, as mitigation at sentencing. The Penal Code (Amendment) Act 2006 requires the court to take into consideration, as mitigation for purposes of sentencing, any custom reconciliation.¹⁶³ Although the Vanuatu Supreme Court has criticized the practice as a form of "trafficking," the practice continues.¹⁶⁴ Beginning in 1994, the Vanuatu Supreme Court commented on it, likely for the first time, in *Public Prosecutor v. Iakis*.

In *Iakis*, at the instigation of two others, the defendants killed a woman in a gruesome machete attack, in the presence of her young son, following a dispute between the woman and her husband and his family.¹⁶⁵ At sentencing, the defendants offered, in mitigation, that they had made custom payments, including a ten-year-old girl, to the victim's husband.¹⁶⁶ In turn, the court commented on two aspects of Tanna¹⁶⁷ *kastom*. First, the court squarely rejected the inference that *kastom* permitted the killing of a woman "simply because there is a disagreement between her and her husband or his family."¹⁶⁸ Refusing to make "allowances" for the importance of custom in Tanna, the court stated:

¹⁶² *Id.*

¹⁶³ Penal Code (Amendment) Act, 2003 (Act No. 17/2003) (Vanuatu).

¹⁶⁴ U.S. DEP'T OF STATE, 2021 TRAFFICKING IN PERSON REPORT: VANUATU (2021), <https://www.state.gov/reports/2021-trafficking-in-persons-report/vanuatu/>; see also Rosemary Sheehan, *Child Welfare in the South Pacific: Deciding Child Protection Matters Across the Pasifika Nations*, 4 INT'L J. CHILD MALTREATMENT, 477, 484 (2021).

¹⁶⁵ *Public Prosecutor v. Iakis*, (1994) VUSC 14 [Supreme Court] (Vanuatu).

¹⁶⁶ *Id.*

¹⁶⁷ Tanna is one of the more populated islands and the site of the active Mount Yasur volcano. See "Guide to Tanna," ANSWER THE CALL OF VANUATU, <https://www.vanuatu.travel/au/guide-to-tanna> (last visited Dec. 18, 2022). Tanna is widely regarded as the most conservative island in the archipelago, and the people most strictly adhere to *kastom*, particularly with respect to gender roles. See Lamont Lindstrom, *Leftamap Kastom: The Political History of Tradition on Tanna, Vanuatu*, 13 AUSTL. J. ANTHROPOLOGY 316, 320 (1982).

¹⁶⁸ *Iakis*, (1996) VUSC 14.

Women are not animals or a piece of property one can just dispose of as one pleases or when one has had enough of them I do not accept that custom regards the ending of a life in cold blood, as right. I do not believe either, that what is wrong in law is right in custom.¹⁶⁹

Invoking constitutional guarantees, the court seemed to clearly say customary practices, no matter how deeply or sincerely held, must give way to law and that *ni-Vanuat* men “must learn that under that law of this country, women are their equals and are entitled to the same protection under the law.”¹⁷⁰

Second, the court found it “extraordinary” that the victim’s husband had received any custom payments, much less a ten-year-old girl, from the defendants for the loss of his wife.¹⁷¹ In particular, the court appeared deeply troubled that the husband, a man who was a “totally immoral and improper person and unfit to hold the rank of pastor of any religion” and “totally unfit to look after a young girl” would be given custody of the child.¹⁷²

The court was again presented with a defendant’s attempt to use his reconciliation payment, in the form of a young girl, as mitigation at his criminal sentencing in *Prosecutor v. Nawia*.¹⁷³ There, Nalin Nawia, a respected businessman and community leader from Tanna, was convicted of Driving Under the Influence of Alcohol and Causing Death by Reckless Driving.¹⁷⁴ Following a two-day drinking binge, Nawia lost control of his pick-up truck and two of his passengers, including a child, were killed in the crash.¹⁷⁵ Prior to the criminal trial, Nawia performed an “elaborate” customary reconciliation ceremony to the chiefs and the victims’ families.¹⁷⁶ The reconciliation payment included:

- | | |
|--|-----------|
| 1. 15 packages of kava, approximate value: | \$ 700.00 |
| 2. 17 bundles of bananas | \$ 45.00 |

¹⁶⁹ *Id.*

¹⁷⁰ *See id.*

¹⁷¹ *Id.*

¹⁷² The victim’s husband had previously appeared in court on charges of raping his sister-in-law. *Id.* Although he was acquitted of the charges, the court formed strong opinions as to his character. *Id.*

¹⁷³ *Public Prosecutor v. Nawia*, (2010) VUSC 52 [Supreme Court] (Vanuatu).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

3.	60 bundles of taro	\$ 225.00
4.	3 baskets of kumala	\$ 13.00
5.	3 cows	\$ 1,200.00
6.	5 pigs	\$ 600.00
7.	15 woven mats	\$ 100.00
8.	6 woven basket	\$ 15.00
9.	216 yards of fabric	\$ 400.00
10.	1 bedsheet	\$ 5.00
11.	90 kg of rice	\$ 180.00
12.	50 kg of salt	\$ 60.00
13.	1 young girl	
14.	Cash	\$ 20,000.00 ¹⁷⁷

At Nawia's criminal sentencing, while the court noted his early admission of guilt during questioning by the police and his plea of guilty were indicators that he had taken responsibility for his conduct and felt remorse, the court also considered that he had initially hidden from the police for two days before he was arrested.¹⁷⁸ The court imposed the minimum sentence of two years imprisonment on the reckless driving charge and six months imprisonment on the driving under the influence charge, to run concurrently.¹⁷⁹

The court next considered whether it was appropriate to suspend the custodial sentences. Taking into account Nawia's age, stature in the community, status as a first-time offender, and the reconciliation ceremony during which he was forgiven by the chiefs, victims' families, and community, the court suspended Nawia's sentence for two years on the condition that he not be convicted of any other crimes during the two-year period.¹⁸⁰ Additionally, given the "general consensus" that he had a "drinking problem," Nawia was prohibited from consuming alcohol for the two-year period and would be monitored by the Probation Service.¹⁸¹

The court then addressed whether the inclusion of the young girl as part of the reconciliation gifts should be counted in mitigation.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* The court also considered, but ultimately rejected, whether he should be given credit for what could be seen as a generosity on his part in that he had offered free rides to the people who were passengers in the bed of the truck at the time of the accident. *Id.* Instead, the court concluded its "sympathies" were with the "innocent unwitting passengers." *Id.*

¹⁷⁹ Public Prosecutor v. Nawia, (2010) VUSC 52 [Supreme Court] (Vanuatu).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

Noting the Chief Justice's comments in *Public Prosecutor v. Kuao*, the court:

Endorse[d] those remarks and [] add[ed] [] concern that this is somewhat like child trafficking. In this instance, a young girl was offered as part of the presentation of gifts in a custom ceremony of reconciliation. Even accepting that there was the loss of two lives in the accident and that the presentation of young girl might be seen as a form of reparation and replacement of the loss, such a practice in this day and age objectifies and devalues the women of Tanna and denies them their fundamental human rights to humane and equal treatment, to life, liberty and security of the person.

Young girls must not be treated as mere objects or commodities that can be swapped or exchanged under any circumstances and for whatever reason, and a customary practice that treats them in that abject manner is inhuman and cannot be founded on Christian principles. Such practices should not be sanctioned by the law which exist for the protection of all.

For the sake of completeness, I direct that the girl involved in the custom reconciliation ceremony presentation be returned forthwith to her parents and family if that has not already occurred. She should not have been offered in the first place and this must never be allowed to happen again.¹⁸²

Likewise, in *Public Prosecutor v. Joseph Frank and Samuel Inam*, the court again addressed the use of children as reconciliation payments.¹⁸³ There, while intoxicated, Frank and Inam stoned and beat a man to death because they believed he had stolen Frank's shoes.¹⁸⁴ The defendants pled guilty and at sentencing, the court considered factors in mitigation.¹⁸⁵ Both defendants were relatively young,¹⁸⁶ first-time offenders, and had performed *kastom* ceremonies to the victim's family.¹⁸⁷ Additionally, Inam's family intended to "give a child

¹⁸² *Id.*

¹⁸³ *Public Prosecutor v. Frank & Inam*, (2011) VUSC 128 [Supreme Court] (Vanuatu).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ The custom ceremonies were performed by the defendant's chiefs and community while the defendants were in police custody pending trial. *Id.*

to the family of the victim to replace their late son.”¹⁸⁸ Adopting the reasoning of *Public Prosecutor v. Mulonturala*, the court refused to take the payment of a child into consideration for purposes of mitigation.¹⁸⁹

The court addressed the use of children in reconciliation for purposes of mitigation in *Public Prosecutor v. Nase* and again referenced Vanuatu’s obligations under the Convention on the Rights of the Child.¹⁹⁰ There, the defendant pled guilty to killing a neighbor’s nine-month old infant in fit of anger.¹⁹¹ At his sentencing, the court considered the defendant’s *kastom* reconciliation to the victim’s family, including the defendant’s intention to give a young girl from his family to the victim’s mother.¹⁹² The court rejected the defendant’s proposal, noting that the practice “ignores the rights of children protected by the Convention on the [R]ights of the Child.”¹⁹³ The court further added, “Children are human beings not material goods that can be traded or exchanged.”¹⁹⁴ Thus, noting the reluctance of the victim’s mother to accept a child from the defendant’s family in exchange for her deceased daughter, the court directed the defendant to consider offering a plot of land to her instead of a child.¹⁹⁵

In a similar case, *Public Prosecutor v. Iou Pisin*, the Supreme Court again commented on the practice.¹⁹⁶ There, Pisin was convicted of Unintentional Harm Causing Death after he ran over and killed a seven-year-old girl after being told by his passenger that it was safe to drive forward.¹⁹⁷ At sentencing, in mitigation, the defendant advised the court that he had made a custom reconciliation ceremony with the victim’s family, including:

1. 45 bundles of bananas
2. 81 yams
3. 6 bundles of special yams

¹⁸⁸ *Id.*

¹⁸⁹ *Public Prosecutor v. Frank & Inam*, (2011) VUSC 128 [Supreme Court] (Vanuatu).

¹⁹⁰ *Public Prosecutor v. Nase*, (2016) VUSC 84 [Supreme Court] (Vanuatu).

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Richard Nanua, *Custom Child Handover Inhumane Says Court*, VANUATU INDEP. (Dec. 7, 2013) (on file with author).

¹⁹⁷ *Id.*

4. 140 maniocs
5. 6 basket maniocs
6. 119 dry coconuts
7. 1 basket of taro
8. 7 woven baskets
9. 34 mats
10. 15 rolls of calico
11. 83 kg of rice
12. 1 cow
13. 2 pigs
14. 5 roots of kava
15. Approximately \$1,000
16. 1 young girl¹⁹⁸

Although Pison was the father of six children, a child of the relative who had been the passenger the night of the accident was given to the victim's family because he was the one who told Pison to drive forward.¹⁹⁹ Rejecting the practice as "inhumane and discriminatory," the court declared the practice "should be re-visited."²⁰⁰ The court noted Vanuatu's obligations as a signatory to the Convention on the Rights of the Child and questioned how the child would be "used" and expressed concerns about her safety and education, but did not order the child returned to her parents as the *Nawia* court ordered.²⁰¹ Pison was sentenced to ten months in prison.²⁰²

Over the last fifteen years, the courts have become progressively less tolerant of the use of children as payment in reconciliation for purposes of mitigation. With increasing frequency, the courts have refused to consider payment of a child for purposes of mitigation and have ordered children returned to their families.²⁰³ At the same time, chiefs continue to insist that "no court decision [will] ever change that" because "girls are used for handing over in this *kastom*."²⁰⁴ In all probability, the court's refusal to accept children as part of reconciliation payments for purposes of mitigation will have little effect on

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² Richard Nanua, *Custom Child Handover Inhumane Says Court*, VANUATU INDEP. (Dec. 7, 2013) (on file with author).

²⁰³ See, e.g., *Public Prosecutor v. Nawia*, (2010) VUSC 52 [Supreme Court] (Vanuatu).

²⁰⁴ Nanua, *supra* note 196.

ending the practice. On the one hand, criminal defendants may conclude that there is nothing to be gained from payment of a child for purposes of mitigation. On the other hand, because *kastom* reconciliations are generally completed long before criminal charges are filed, and certainly before most cases ever go to trial, decisions about what to include as payment are made long before mitigation concerns are at issue.²⁰⁵ The more significant point, however, is that for most *ni-Vanuatu*, a good relationship with their chief is far more important than what a (foreign) judge on a far-away state court might say.²⁰⁶ Most *ni-Vanuatu* are likely to abide by their chiefs' orders, even if it conflicts with court orders.²⁰⁷ Finally, given the remoteness of many of the communities and the lack of any police presence, enforcement of court orders, such as the return of a child, is nearly impossible and does not carry the same weight generally accorded to court orders.²⁰⁸

ANALYSIS

I. *KASTOM* ADOPTION REALLOCATIONS VIOLATE CONTEMPORARY *KASTOM* LAW

The fundamental adoption principles articulated in state law *do* apply to *kastom* adoptions despite the general acceptance that they apply only to state adoptions. A chief's exercise of customary law may not be in conflict with written law nor contrary to justice.²⁰⁹ Additionally, the language of the CRC, Adoption Act, and Guardianship Act arguably makes these statutes applicable to *kastom* adoptions ordered by chiefs in Island Courts. Finally, even more broadly, the fundamental adoption principles apply to all decisions regarding children, regardless of whether it is *kastom* or not. To hold otherwise

²⁰⁵ See *Penal Code: Sexual Offences & Customary Reconciliation Legislative Review No. 05/14*, VANUATU L. COMM'N, https://www.sistalibrary.com.vu/wp-content/uploads/2020/05/Sexual_Offences_Final_Report.pdf (last visited Dec. 18, 2022).

²⁰⁶ See Miranda Forsyth, *Understanding Judicial Independence in Vanuatu*, AUSTL. NAT'L UNIV. (Sept. 2019), https://dpa.bellschool.anu.edu.au/sites/default/files/publications/attachments/2015-12/DP-2015-9-Forsyth-ONLINE_0.pdf.

²⁰⁷ See *id.* This is particularly true in the out islands where people have little interaction with any authorities other than chiefs.

²⁰⁸ *Conflict Management and Access to Justice in Rural Vanuatu*, POLICING & JUST. SUPPORT PROGRAM (July 2016), <https://www.dfat.gov.au/sites/default/files/conflict-management-access-justice-rural-vanuatu.pdf>.

²⁰⁹ Island Courts Act, 2006 (Vanuatu).

leads to the situation that exists in Vanuatu, in which groups of similarly situated children are treated differently—the rights of some children are protected, while the rights of others are ignored.

Kastomary law exists parallel to state law and is exercised primarily in two contexts: by chiefs acting as Village Court Justices and by chiefs acting in their private capacity to settle disputes in the community. While technically distinct types of proceedings, in practice, it is little more than a matter of semantics.²¹⁰ For example, in most of the outer islands, where roughly 80 percent of the population lives, there is no physical structure formally designated as the “Island Court”.²¹¹ Instead, “formal hearings” are held in the *nakamal* or *nasara*, the same places that are used in private, non-court proceedings.²¹² Additionally, the parties to a dispute, including the chief and Island Court Justice, are the same whether the proceeding is a formal case in front of the Island Court or an informal dispute resolution in front of the chief.²¹³ Practically speaking, there is no meaningful distinction between the two contexts in which chiefs apply customary law.

The interpretation of what customary law requires in any context will depend on the customs and practices of a particular *wontak*. The beauty to some, and the frustration to others, is that, despite the national coalition around a generic *kastom*, there is no one *kastom*. What is required or prohibited by *kastom* in one *wontak* is not necessarily required or prohibited by *kastom* in another *wontak*.²¹⁴ Even so, the application of customary law is not unlimited.

Article 10 of the Island Courts Act provides that an Island Court “shall administer the customary law prevailing within the territorial jurisdiction of the court so far as the same is *not in conflict with any written law* and is *not contrary to justice, morality, and good order*.”²¹⁵ In the context of *kastom* adoptions, it follows that chiefs are not permitted to order *kastom* adoptions that conflict with adoption laws or that are contrary to justice.

²¹⁰ Interview with Don Paterson (Mar. 4, 2014), *supra* note 1.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ Veenendal, *supra* note 20, at 1335.

²¹⁵ Island Courts Act, 2006 (Vanuatu) (emphasis added).

II. *KASTOM* ADOPTION REALLOCATIONS VIOLATE INTERNATIONAL AND DOMESTIC LAW'S REQUIREMENT THAT ADOPTIONS ARE IN A CHILD'S BEST INTEREST

In addition to violating contemporary *kastom*, *kastom* adoptions also violate the fundamental child's best interest principle in relevant international and domestic law.

A. *International Law*

Vanuatu ratified the United Nations' CRC in 1993.²¹⁶ The CRC is the most widely ratified human rights treaty in history.²¹⁷ It is premised on the belief that children are not merely passive objects who belong to their parents and for whom decisions are made.²¹⁸ Rather, they are human beings and individuals with autonomy rights of their own.

The CRC does not take a position as to whether state parties should permit adoptions.²¹⁹ Instead, where adoptions are permitted, the focus is on ensuring a transparent system that permits adoptions only when they are in a child's best interest. Article 21 of the CRC provides:

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child *shall be the paramount consideration* and they shall:

- (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned

²¹⁶ Convention on the Rights of the Child (Ratification) Act, 1993 (Vanuatu). Vanuatu is not a party to the Hague Convention on Inter-Country Adoption; however, some have argued that the Hague "is indirectly part of the law of Vanuatu." Corrin & Farran, *The Law of Adoption*, *supra* note 108, at 150.

²¹⁷ "Children's Human Rights," AMNESTY INT'L, <https://www.amnesty.org/en/what-we-do/child-rights/> (last visited Dec. 19, 2022). Only the United States is not a party to the CRC. *Id.*

²¹⁸ COMM. ON THE RTS. OF CHILD., GEN. COMMENT NO. 14 (2013) ON THE RIGHT OF THE CHILD TO HAVE HIS OR HER BEST INTS. TAKEN AS A PRIMARY CONSIDERATION (ART. 3, PARA. 1)* (2013).

²¹⁹ G.A. Res. 45/25, art. 21 (Nov. 20, 1989) (emphasis added).

have given their informed consent to the adoption on the basis of such counseling as may be necessary²²⁰

This is in contrast to instances elsewhere in the CRC, in which a child's best interest need only be a *primary* consideration in actions concerning children.²²¹ The requirement that a child's best interest is to be *the* paramount consideration in an adoption recognizes that, while adoptions inherently effect the rights of others, the child's welfare must outweigh all other concerns.

The CRC does not distinguish between state and *kastom* adoptions. Instead, it imposes the obligation to ensure that a child's best interest is the paramount consideration on any State Party that permits adoptions of *any kind*.²²² As a State Party, Vanuatu is obligated to ensure that all adoptions are conducted in compliance with its obligations under the CRC.²²³ There is no exception for *kastom* adoptions.

B. *Domestic Law*

"The law" in Vanuatu is a complex, plural system made up of the constitution, legislation, common law, and customary law—all reflective of the country's unique history. During the Condominium period of joint rule by France and England, British laws applied to British citizens and French laws applied to French citizens.²²⁴ Other residents, including the indigenous population, known as "optants," were permitted to choose between the two.²²⁵ At independence, the distinction between the applicability of British or French law based on nationality was abolished.²²⁶ Pursuant to Article 95 of the Vanuatu Constitution

British and French laws in force or applied in Vanuatu immediately before the Day of Independence shall on and after that day continue to apply to the extent that they are not expressly revoked or incom-

²²⁰ *Id.*

²²¹ G.A. Res. 45/25, art. 3 (Nov. 20, 1989).

²²² G.A. Res. 45/25, art. 21 (Nov. 20, 1989).

²²³ See Convention on the Rights of the Child (Ratification) Act, 1993 (Vanuatu).

²²⁴ See Corrin & Farran, *The Law of Adoption*, *supra* note 108, at 153.

²²⁵ *Id.*

²²⁶ VANUATU CONST., chp. 15, art. 95.

patible with the independent status of Vanuatu and wherever possible taking due account of custom.²²⁷

Accordingly, all law that existed at the time of independence, commonly referred to as “received law,”²²⁸ became the law of Vanuatu.²²⁹

III. APPLICABILITY OF THE ADOPTION ACT OR GUARDIANSHIP ACT TO *KASTOM* ADOPTIONS

At the time of independence, adoption, like other issues,²³⁰ was addressed by multiple statutes: the Adoption Act of 1958 (UK)²³¹ and the French Civil Code.²³² A new Adoption Law was drafted in 2018, but was never passed.²³³ In its absence, the Adoption Act of 1958 and the French Civil Code remain the adoption law in Vanuatu.²³⁴ The two statutes are not strictly inconsistent with each other, but the French Civil Code expressly speaks to some procedural aspects on which the Adoption Act is silent.²³⁵ Together, the two statutes form “the adoption law of Vanuatu. Neither has precedence over the other

²²⁷ *Id.*

²²⁸ Legislation that pre-dates Independence is generally referred to as “received law” to distinguish it from law enacted by the sovereign nation post-Independence. Interview with Don Paterson (Mar. 4, 2014), *supra* note 1; *see also* Kenneth Brown, *Reconciling Customary and Received Law in Melanesia: The Postindependence Experience in Solomon Islands and Vanuatu* (2003) (Ph.D. dissertation, Northern Territory University).

²²⁹ In the Matter of MM, (2014) VUSC 78 [Supreme Court] (Vanuatu). “The effect of Article 95 was to make the law in force immediately [before] independence, whether derived from French law or English law or otherwise, the law of general application to everyone within the Republic equally without distinction based on nationality or origin.” *Id.* (quoting Joli v. Joli, (2003) VUCA 27 [Court of Appeal] (Vanuatu)).

²³⁰ For example, at Independence, Vanuatu did not have its own penal code. *See In the Matter of MM*, (2014) VUSC 78 (discussing the “three distinct sets of criminal laws” applicable in Vanuatu: the French Penal Code, the English Penal Code, and the Native Penal Code made under the Joint Regulation 12 of 1962 which applied only to Native Hebridians i.e. *ni-Vanuatu*).

²³¹ Adoption Act (U.K.).

²³² CIVIL CODE [C. CIV] [CIVIL CODE] art. 343-372 (Fr.).

²³³ *See* Glenda Willie, *Vanuatu to Have Adoption Law*, DAILY POST (May 18, 2017), https://www.dailypost.vu/news/vanuatu-to-have-adoption-law/article_10d9736a-26df-5d9f-98c0-bbc5c7c769ad.html; PAC. ISLANDS LEGAL INFO. INST., 2018 VANUATU SESSIONAL LEGIS. (2018).

²³⁴ *See In the Matter of MM*, (2014) VUSC 78.

²³⁵ For example, Section 2(3) of the Adoption Act prohibits the adoption of a female child by a single male prospective adoptive parent. *See* Adoption Act (U.K.). The Civil Code, on the other hand, does not address whether a female child may be adopted by a single male prospective adoptive parent, but it provides generally that any person over the age of 26 can request an adoption. *See* CIVIL CODE [C. CIV] [CIVIL CODE] art. 342-1 (Fr.).

and both apply to everyone.”²³⁶ While much of the procedural aspects of the Adoption Act are inapplicable to Vanuatu,²³⁷ it is the adoption law most frequently referenced by the courts.²³⁸

With respect to a child’s best interest, Section 7 of the Adoption Act requires that, before entering an adoption order, the court must be satisfied that the adoption is “for the welfare of the [child].”²³⁹ For example, *In re Chelsea Lee* concerned the adoption of a *ni-Vanuatu* child by Australian citizens who were long-term Vanuatu residents. Noting the absence of court welfare officers and social workers and that the “paramount consideration must be for the welfare of the child,” the judge personally visited the petitioners’ home.²⁴⁰ The court was concerned with whether the petitioners were “suitable persons” to adopt.²⁴¹ The court stressed that even though the petitioners were the only people trying to adopt the child, it did “not mean they can automatically adopt the child.”²⁴² Additionally, recognizing the unique concerns inherent in cross-culture adoptions, the court was concerned with whether the petitioners were aware of the issues involved in adoptions generally and “particularly [in] one when the child is of a different skin colour [sic] and comes from a different cultural background than their own.”²⁴³ The court was rightly concerned with the best interest of the child.

Alternatively, even though the arrangements are referred to as adoptions, they are something closer to guardianship arrangements because they do not require the termination of the biological parent’s rights.²⁴⁴ This distinction is recognized in the local language. In Bislama, a *kastom* adoption is referred to as “*karemaot*” (care being

²³⁶ Practically speaking, this means, for example, that where one piece of legislation has two requirements and the other piece of legislation has three requirements, the litigant must meet all five requirements. See *In the Matter of MM*, (2014) VUSC 78.

²³⁷ For example, the Adoption Act (U.K.) makes several references to English bodies and procedures that do not exist in Vanuatu—English magistrates courts, English procedure, English registration of adoptions, English societies and English laws related to intestacies, wills, and settlements. It also makes provisions for applicants domiciled in England or Scotland. See Corrin & Farran, *The Law of Adoption*, *supra* note 108, at 151 (discussing applicability in Vanuatu notwithstanding that much of the Adoption Act is irrelevant to the island’s circumstances).

²³⁸ *Id.*

²³⁹ Adoption Act, § 6 (U.K.).

²⁴⁰ *In re Chelsea Lee*, (2000) VUSC 22 [Supreme Court] (Vanuatu).

²⁴¹ *Id.*

²⁴² An earlier petition by biological family members had been withdrawn. *Id.*

²⁴³ *Id.*

²⁴⁴ Corrin & Farran, *The Law of Adoption*, *supra* note 108, at 155.

handed over to someone else) and a state adoption is referred to as "*adoptemaot*."²⁴⁵ In the absence of termination of the biological parents' rights, the United Kingdom Guardianship of Minors Act (Guardianship Act) should apply. Like the Adoption Act, the Guardianship Act was in effect before independence and remains the applicable law in the absence of more recent legislation.²⁴⁶ The Guardianship Act provides:

General Principles: Principle on which questions relating to custody, upbringing etc. of minors are to be decided:

1. Where in any proceeding before any court (whether or not a court as defined in Section 15 of this Act)—

- (a) the custody or upbringing of a minor; or
- (b) the administration of any property belonging to or held in trust for a minor, or the application of the income thereof, is in question, the court, in deciding that question shall regard the *welfare of the minor as the first and paramount consideration*²⁴⁷

The Adoption and Guardianship Acts apply whenever a court enters adoption or guardianship orders.²⁴⁸ Section 57 of the Adoption Act grants jurisdiction to "any court having jurisdiction to make adoption orders" which presumably includes Island Courts, presided over by chiefs, with authority to order adoptions.²⁴⁹ Accordingly, a child's welfare must be the chief's primary concern when considering *kastom* adoptions.

Section 1 of the Guardianship Act provides that the Act applies to proceedings before "any court" whether or not identified in Section 15.²⁵⁰ Section 15 of the 1971 English law does not specifically include Island Courts;²⁵¹ however, Article 52 of the Vanuatu Constitution states, "Parliament shall provide for the establishment of village or island courts with jurisdiction over customary and other matters and

²⁴⁵ *Id.*

²⁴⁶ Guardianship of Minors Act 1971, c. 3 (U.K.).

²⁴⁷ *Id.* (emphasis added).

²⁴⁸ *Id.*

²⁴⁹ Adoption Act, § 57 (U.K.).

²⁵⁰ Guardianship of Minors Act 1971, c. 3 (U.K.).

²⁵¹ *Id.*

shall provide for the role of chiefs in such courts.”²⁵² Accordingly, an Island Court, presided over by the chief, is a “court” for purposes of the Guardianship Act.²⁵³ Moreover, the statute applies when the “custody or upbringing of a minor” is in question.²⁵⁴ The move from the biological parents to the adoptive parents is a change in custody and upbringing. Therefore, in Island Court proceedings, a child’s best interest must be the chief’s “first and primary consideration” when considering a *kastom* adoption.

If it is true that neither the CRC, Adoption Act, nor Guardianship Act apply to *kastom* adoptions, the distinction between state adoptions (and guardianship actions) and *kastom* adoptions is not that one is formalized in a state court and the other is not, but rather that the best interests of some children are protected while the best interests of others are ignored. This is particularly concerning given that the majority of adoptions in Vanuatu are *kastom* adoptions. A two-tier system that treats similarly situated children differently surely cannot be the intent of the Vanuatu government or consistent with the constitutional guarantee of “equal treatment.”²⁵⁵ Furthermore, even if the Convention and Acts do not expressly apply, there is a long-standing application of the fundamental welfare principle (i.e. the best interests of the child) to all questions concerning a child’s custody.²⁵⁶ The question then becomes whether *kastom* reallocations of children for the benefit of third parties are in a child’s best interest. They are not.

²⁵² VANUATU CONST., chp. 8, art. 52.

²⁵³ *Id.*

²⁵⁴ Guardianship of Minors Act 1971, c. 3 (U.K.).

²⁵⁵ See VANUATU CONST., chp. 2, art. 5.

²⁵⁶ See *Michel v. Michel & Toagase*, (2001) VUSC 71 [Supreme Court] (Vanuatu) (“It has been a well-established principle of law in cases where custody is in dispute; the welfare of the children is a paramount consideration when Court[s] decide who should have custody of the children (referred to as “Welfare Principle”)); *Kilman v. Melterongrong*, (2021) VUSC 326 [Supreme Court] (Vanuatu) (involving a custody dispute between unmarried parents where the court granted custody to the mother because it was in the best interest of the child); *Iati v. Nishai*, (2021) VUSC 27 [Supreme Court] (Vanuatu) (relying on Article 3(1) of the CRC and the Vanuatu Guardianship of Minors Act 1971, the court determined custody of the child at issue based on the best interests of the child).

IV. *KASTOM* ADOPTION REALLOCATIONS ARE NOT IN A CHILD'S BEST INTEREST

Kastom reallocations of children often result in the unanticipated and immediate removal of children from their home and their parents. This harms children in multiple ways. First, the sudden removal itself can be shocking and traumatic. Anecdotal evidence is replete with stories of *ni-Vanuatu* children who were forcibly removed, while screaming, from their mothers.²⁵⁷ Second, while older children may understand why they are being sent away, it that does not mean it is something they want. For younger children, the confusion about why they are being sent away can be as painful as the actual separation.²⁵⁸

Many child psychologists and psychiatrists agree that the lasting results of a child's traumatic separation from his parent(s) cannot be over-stated.²⁵⁹ Decades of research has shown that children need safe, supportive relationships with their primary care-givers in order to thrive physically and emotionally.²⁶⁰ A child's stress response system, growth, health, and well-being depend on the parent shielding the child from trauma and reestablishing a sense of safety.²⁶¹ "Children who have experienced traumatic separations from their parents have shown delays in receptive and expressive language, difficulty with sustained attention and concentration, and delays in executive functioning and problem-solving."²⁶² Delays in these areas make normal childhood tasks such as making friends, playing sports, and doing schoolwork difficult, if not impossible.²⁶³

The trauma of the actual removal is often compounded by the child's experience in the new home. Reallocated children are not

²⁵⁷ Field notes on file with author.

²⁵⁸ Field notes on file with author. Serah, a 34-year-old-woman who had been reallocated at about age six as part of a reconciliation ceremony, remembers being very "confused and lonely." She never fully understood why she was sent away in a *kastom* adoption and often wondered, as a child, if it was because her parents did not want her anymore. *Id.*

²⁵⁹ Margaret R. Paccione-Dyszlewski, *Parent/Child Separation: Immediate Trauma with Lifelong Consequences*, BROWN UNIV. CHILD & ADOLESCENT BEHAV. LETTER, Sept. 2018, at 8.

²⁶⁰ Alison Knopf, *Immigration Policy: Separating Children From Parents Unnecessary and Costly Trauma*, BROWN UNIV. CHILD & ADOLESCENT BEHAV. LETTER, Sept. 2018, at 4.

²⁶¹ *Id.*

²⁶² Paccione-Dyszlewski, *supra* note 259, at 8.

²⁶³ *Id.*

always entirely welcome in their “adoptive” homes.²⁶⁴ The arrival of a new child can place additional financial stress on a household. In a country where approximately 15 percent of the population lives below the basic needs poverty line,²⁶⁵ resources are scarce, and the needs of reallocated children are often not a priority. A reallocated child is often the last one fed,²⁶⁶ the one forced to sleep outside,²⁶⁷ and the one for whom there are no school fees.²⁶⁸ Reallocated children make easy scapegoats and are sometimes referred to as “Cinderella children,” a reference to the fairy tale in which Cinderella holds a distinctly lower position than other children in the home.²⁶⁹

The new children can also be a daily reminder of the loss for which they are intended to serve as compensation. For example, Denise, the “adoptive mother” of Mary disliked and resented the child.²⁷⁰ The chief gave Mary to Denise and her husband as compensation for severe injury to Denise’s son during an altercation with a member of Mary’s family.²⁷¹ Denise felt Mary was “more trouble than she was worth . . . I never asked for her. She was a trouble child. Always running away and telling lies. She made trouble with the neighbors. She made trouble with my own children. We had to pay her school fees but she would not go to school.”²⁷²

Additionally, reallocation normalizes violence against children as a form of punishment and discipline.²⁷³ The acceptance of violence against women and children reduces the likelihood that neighbors or the larger community will intervene in what is viewed as a private

²⁶⁴ See Kavitha Suthanthiraraj, *Unseen, Unsafe: The Underinvestment of Ending Violence Against Children in the Pacific and Timor-Leste*, SAVE THE CHILD. (2019), https://resourcecentre.savethechildren.net/pdf/stc01615_unseen-unsafe-report_web-1.pdf/.

²⁶⁵ The national level of consumption-based poverty (percentage of population living below the total poverty line) could be considered low at 13 percent; however, this figure is a little misleading in that it is as high as 24 percent in some urban areas. U.N. Women Fiji, *Women and Children’s Access to the Formal Justice System in Vanuatu*, U.N. WOMEN (2016), <https://asiapacific.unwomen.org/en/digital-library/publications/2016/07/women-and-childrens-access-to-the-formal-justice-system-in-vanuatu> (last accessed Dec. 18, 2022).

²⁶⁶ Field notes on file with author.

²⁶⁷ Field notes on file with author.

²⁶⁸ Field notes on file with author.

²⁶⁹ Field notes on file with author. See also Tom Ferrell, *Children Pretend Neglect but Emotional Pain is Real*, N.Y. TIMES (Mar. 24, 1981), <https://www.nytimes.com/1981/03/24/science/children-pretend-neglect-but-emotional-pain-is-real.html>.

²⁷⁰ Interview with Denise G., in Port Vila, Vanuatu (Sept. 1, 2014) (on file with author).

²⁷¹ *Id.*

²⁷² Field notes on file with author.

²⁷³ Suthanthiraraj, *supra* note 264.

family affair.²⁷⁴ The general acceptance of violence against children acts as a disincentive to women and children to seek help.²⁷⁵ Reallocated children are often a lightning rod for physical abuse.²⁷⁶ As Ninna, a young woman who was reallocated at the age of seven explained:

At my [adoptive] father's home it was bad. They were very bad to me. I was sent when I was seven to do cleaning and some cooking. My [adoptive] father had three other children, all boys. The boys were allowed to do anything. He was always angry that he had to pay for my food or that I made a mistake. He beat me very harsh. Sometimes he used a branch or rope. I hid in the bush when he was drinking because he would beat me so many times. I never wanted to be there and I missed my mother and sister.²⁷⁷

Although violence against women and children is on daily display in any village,²⁷⁸ no centralized government system collects child protection data.²⁷⁹ Data collected over the years by non-governmental organizations working in the area of child protection clearly demonstrates that *ni-Vanuatu* children, especially girls, are at great risk of physical, sexual and emotional abuse.²⁸⁰ For example, 84 percent of children ages two through 14 have experienced “violent discipline” in their homes.²⁸¹ The prevalence of sexual abuse against girls is one of the highest in the world—almost a third of the female population under fifteen has been sexually abused.²⁸² Reallocated girls make up the largest group (39 percent) of sexual assault victims under eighteen.²⁸³ They are also at the greatest risk of incest,²⁸⁴ which is all the

²⁷⁴ *Id.*

²⁷⁵ *See id.*

²⁷⁶ Field notes on file with author.

²⁷⁷ Field notes on file with author.

²⁷⁸ Physical violence by family members, teachers, police, and religious leaders, against children as young as 2 years of age is common and accepted as necessary to ensure the child is obedient and respectful. UNICEF, *supra* note 132, at 7.

²⁷⁹ *See id.* at 120.

²⁸⁰ For example, almost 30 percent of *ni-Vanuatu* women report their first sexual experience was forced. *Id.* at 88.

²⁸¹ *Id.* at 86.

²⁸² *Id.* at 88.

²⁸³ Vanuatu Women's Ctr., *Violence Against Young Women and Girls in Vanuatu: The Effectiveness of Outreach and Prevention Strategies*, SISTA LIBR. (July 2020), <https://www.sistalibrary.com.vu/wp-content/uploads/2021/03/VWC-research-on-violence-against-young-women-and-girls-2020-1-1.pdf>.

more remarkable given that Vanuatu has one of the highest rates of incest among girls in the Asia-Pacific region.²⁸⁵

The harm of the reallocation is not limited to just children. The extended family, especially mothers of the reallocated child, are also traumatized.²⁸⁶ Mothers of children who were reallocated describe it as “punishment,”²⁸⁷ “big pain,”²⁸⁸ and “like a death.”²⁸⁹ For example, Rebeka described the reallocation of her nine-year-old daughter as something she cries about daily.²⁹⁰ The child was reallocated by the chief to Rebeka’s grandmother in a *kastom* adoption because the 16-year-old niece who had been taking care of the grandmother was pregnant and getting married, leaving no one to look after the grandmother.²⁹¹ Rebeka’s nine year-old daughter was sent to take the niece’s place and care for the grandmother.²⁹² Rebeka objected and begged her husband to talk to the chief.²⁹³ Her husband refused and she was forbidden from speaking to the chief on her own.²⁹⁴ The child was taken to the grandmother’s village, and Rebeka saw her only a couple of times in the following months at family gatherings.²⁹⁵ After that, Rebeka stopped attending family gatherings because it was too painful for her and her daughter.²⁹⁶

Whether the *kastomary* practice is considered an adoption, a guardianship placement, or a *kastom* adoption, the reallocation of children for the benefit of third parties is not in a child’s best interests. In a place where social status is attained with age, children have a very low status and very little power.²⁹⁷ Instead, children are “largely voiceless” and have only minimal rights.²⁹⁸ Chiefs, on the other hand, are all powerful.

²⁸⁴ UNICEF, *supra* note 132, at 88.

²⁸⁵ Interview with Rebeka G., in Port Vila, Vanuatu (Sept. 21, 2014) (on file with author).

²⁸⁶ See UNICEF, *supra* note 132, at 86.

²⁸⁷ Interview with Rebeka G., *supra* note 285.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ Interview with Rebeka G., in Port Vila, Vanuatu (Sept. 21, 2014) (on file with author).

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ See Suthanthiraraj, *supra* note 264.

²⁹⁸ *Id.*

V. KASTOM ADOPTION REALLOCATIONS VIOLATE STATE LAW'S PROHIBITION AGAINST BENEFITS TO THIRD PARTIES IN EXCHANGE FOR THE ADOPTION

A. State Law and its Application to Kastom Adoptions

Most adoption statutes prohibit improper benefits to third parties in exchange for an adoption.²⁹⁹ The goal is to ensure that children are not used as commodities or reassigned for the benefit of another. Vanuatu's Adoption Act, likewise, prohibits such payments.³⁰⁰ Section 7(c) provides that before a court may enter an adoption order, it must be satisfied "that the applicant has not received or agreed to receive, and that no person has made or given or agreed to make or give to the applicant, *any payment or other reward* in consideration of the adoption except as the court may sanction."³⁰¹ The prohibition against benefits to third parties is echoed in Section 50:

- (1) Subject to the provisions of this section, *it shall not be lawful to make or give to any person any payment or reward* for or in consideration of—
 - (a) the adoption by that person of an infant;
 - (b) the grant by that person of any consent required in connection with the adoption of an infant;
 - (c) the transfer by that person of the care and possession of an infant with a view to the adoption of the infant; or
 - (d) the making by that person of any arrangements for the adoption of an infant.³⁰²

²⁹⁹ See, e.g., TENN. CODE ANN. § 36-1-109 (West 2014) (making it unlawful to "[c]harge or receive from or on behalf of any person or persons legally adopting or accepting a child for adoption any remuneration, fee, contribution, or thing of value whatsoever for rendering any service described in § 36-1-108 in connection with the placement of such child for adoption or in connection with the placement of such child for foster care or adoption with one other than the child's parent or parents other than that now or hereafter allowed by law . . ."); VT. STAT. ANN. tit. 15, § 7-105 (West 1995) ("[A] person may not pay or give or offer to pay or give to any other person, or request, receive, or accept any money or anything of value, directly or indirectly, for: (1) the placement of a minor for adoption; (2) the consent of a parent, a guardian, or an agency to the adoption of a minor; (3) the relinquishment of a minor to an agency for the purpose of adoption; or (4) the recruitment of nonresident pregnant women to locate in this State for the purpose of relinquishing the child for adoption.").

³⁰⁰ Adoption Act (U.K.).

³⁰¹ *Id.* (emphasis added).

³⁰² *Id.* (emphasis added). Anyone who makes or promises to make prohibited payments is subject to criminal prosecution.

Similar to the arguments against the applicability of the Adoption Act to *kastom* adoptions in the context of a child's best interest, some have argued that its prohibitions against improper benefits likewise do not apply.³⁰³ This argument must fail for the same reasons as in the best interest context—jurisdiction is created by Section 57 of the Constitution and to conclude otherwise results in a two-tier system in which some children are protected while others are not.

B. *Prioritizing Benefits to Third Parties Harms Children*

As demonstrated above in Part III, *how* children are reallocated for the benefit of third parties varies. In contrast, *why* children are reallocated for the benefit of others generally remains the same: in *kastom*, the root of all chiefly decision-making is always community peace and harmony.³⁰⁴ The focus is on restoring relationships that have been damaged by the conflict.³⁰⁵ In the communal society, where everyone helps and relies on each other, conflict in the community disrupts relationships and means that people will not help each other unless relationships are restored.³⁰⁶ Restoring damaged relationships is important; however, prioritizing community needs over the interest of children causes multiple types of harm to children.

Two types of benefits arise from reallocations. The primary benefit to an individual person is the benefit the statute most clearly prohibits: improper payments intended to facilitate an adoption.³⁰⁷ The prohibition typically contemplates adoptive parent(s) making payments to biological parent(s). A reallocation can also involve just the two parties—the adopting parent(s) and the biological parent(s)—but with a different kind of benefit. In a simple illustration, it might look as follows: Tom did a bad thing to Ted and his family. The chief ordered Tom to compensate Ted in the form of two pigs, three mats, and his eight year-old daughter. When Tom was criminally tried and convicted for the bad thing he did, he offered his *kastom* payment, including his daughter, as mitigation. In this instance, Tom was both

³⁰³ Field notes on file with author. See also *Child Adoption: Trends and Policies*, UNITED NATIONS DEPT OF ECONOMIC AND SOCIAL AFFAIRS, 358, 412 (2009), <https://www.un.org/en/development/desa/population/publications/pdf/policy/child-adoption.pdf>.

³⁰⁴ See Powles, *The Common Law at Bay*, *supra* note 86, at 66.

³⁰⁵ FORSYTH, *supra* note 10, at 105.

³⁰⁶ *Id.* at 106.

³⁰⁷ Adoption Act (U.K.).

the biological parent and the party who benefited from the child being placed in a *kastom* adoption because he received a lesser sentence.

Additionally, in many instances, reallocations also include a third party who is neither the adopting nor biological parent but is the third party who will benefit from the reallocation. It might look like the following scenario: David did a bad thing to Edward and his family. The chief ordered David to compensate Edward in the form of two pigs, three mats, and a child. Because David did not have children of his own, a child was taken from his extended family. When David was criminally tried and convicted for the bad thing he did, he offered his *kastom* payment, including his niece, as mitigation. In this instance, David was neither the adoptive parent nor the biological parent; instead, he was a third party who benefited from the child being placed in a *kastom* adoption because he received a lesser sentence.

The second type of benefit arising from a reallocation is the benefit to the greater community. As payment intended to restore peace and harmony in the community, reallocations make children's interests secondary to the community's interest. Following the chief's determination of wrong-doing, a *kastom* meeting will be held to repair the relationships.³⁰⁸ In this context, the goals of the *kastom* meeting are:

[R]estorative—namely, “*blong mekem [tufali pati] sekhan mo kam gudfala fren bakegen*” (to make the two parties shake hands and become friends again)—and to allow the offender to “*klinim fes*” (literally, “clean his face”, meaning remove the sense of shame and restore respect to the wrongdoer in the face of the community).³⁰⁹

After the offender has been allowed to make his *kastom sori* (apology),³¹⁰ compensation payments will be made.

Exploitative reallocations of children, for the benefit of others, has led to children being forced into domestic labor, neglected, and sexually abused.³¹¹ Reallocated children describe their experiences as “lonely,” “always working,” and “being disliked.”³¹² For example, a young woman who was reallocated at the age of nine described her

³⁰⁸ Interview with Don Paterson (Mar. 4, 2014), *supra* note 1.

³⁰⁹ FORSYTH, *supra* note 10, at 106.

³¹⁰ *Id.* at 107.

³¹¹ See Suthanthiraraj, *supra* note 264.

³¹² Field notes on file with author.

place in her adoptive family as the "do it girl," the girl who could be told by her adoptive family and neighbors to do any chore that arose.³¹³ Other reallocated children describe their experience as being "necessary to remove my father's shame," "the way to make peace for everyone," and "being given away even though I was not the person who said *sori*."³¹⁴

The *kastom* system places greater value on peace and harmony in the community than on individual rights.³¹⁵ A chief's priority is to maintain peace in the community, even at the cost of a safe environment for children.³¹⁶ Prioritizing peace and harmony in the community may help to ensure a level of cohesion and cooperation, but the welfare, protection, and best interests of children are often not given adequate consideration.³¹⁷ Decisions made in the interest of the larger community may have positive long-term effects for the community, but they also put children at increased risk when custom is "used as a substitute rather than in conjunction with formal services."³¹⁸ The emphasis on the larger community also works to silence women and children.³¹⁹ In other words, children who are used as compensation are unable to object to reallocation and must accept it for the greater good of the community.³²⁰ Finally, once a *kastom* ceremony has taken place, the issue is considered to be resolved.³²¹ Follow-up services to children are essentially non-existent.³²² Village authority rests with the chief and is rarely challenged, especially by women or children. Decisions that affect the welfare of women and children for the greater good of the community often conceal the power dynamics that victimize these groups.

313 Field notes on file with author.

314 Field notes on file with author.

315 FORSYTH, *supra* note 10, at 108.

316 See also Sheehan, *supra* note 164, at 485.

317 MINISTRY OF JUST. & CMTY. SERVS., *supra* note 16, at 15.

318 *Id.* at 15.

319 *Id.* at 12.

320 FORSYTH, *supra* note 10, at 109.

321 See MINISTRY OF JUST. & CMTY. SERVS., *supra* note 16, at 16.

322 *Id.*

VI. *KASTOM* ADOPTION REALLOCATIONS VIOLATE LONG *KASTOM*

Kastom adoptions did occur in *long kastom*, but those adoptions were fundamentally different from contemporary *kastom* adoptions.³²³ In *long kastom*, *kastom* adoptions occurred only after the full participation and agreement of all parties concerned.³²⁴ The views and wishes of the biological parents and the adoptive parents were considered. Where children were old enough, they were also included in the discussion. The discussions served to protect the parties' interests, including the child's. The goals of restoring community harmony and repairing relationships could be achieved only because the outcome was based on the meaningful participation of the full community, including the parties. Additionally, in *long kastom*, before the arrival of a state court system and penal code, offenders were not sent away to serve jail sentences and, therefore, had no need of *kastom* payments as bargaining chips for purposes of mitigation.

Today, the reallocation of children, primarily young girls, is still widely defended as *kastom*. This position ignores the reality that the evolution and genderization of *kastom* has so altered the practice that it no longer bears any resemblance to its original form. Chiefs rarely, if ever, include the biological or adoptive mothers or the children in discussions.³²⁵ It seems extremely unlikely that community harmony could be restored when some of the primary parties are excluded from any discussion of the matter. The contemporary interpretation of *kastom*, on the other hand, is a gendered *kastom* that is deeply patriarchal with entrenched notions of gender roles.³²⁶ The "strict division of responsibility and privilege between men and women, with men considered to be inherently superior"³²⁷ puts women and children at great risk of violence and works to exclude them from participation in public affairs, even ones that expressly concern them.

³²³ Interview with Don Paterson, Emeritus Professor of L., Univ. of the S. Pac., in Port Vila, Vanuatu (Sept. 2, 2014 (on file with author).

³²⁴ *Id.*

³²⁵ Over more than five years of interviews and research, the author has never heard of an instance in which the Chief discussed the *kastom* adoption with the biological mother or the child before ordering it.

³²⁶ See Suthanthiraraj, *supra* note 264.

³²⁷ See MINISTRY OF JUST. & CMTY. SERVS., *supra* note 16, at 12.

A. *The Genderization of Kastom*

Prior to the arrival of the missionaries, *ni-Vanuatu* women often held leadership positions similar to the positions held by the men who the missionaries identified as "chiefs."³²⁸ Like the men, the women had graded societies, participated in pig-killing and chief-only meetings in the *nasara*.³²⁹ Missionaries, however, were firmly committed to the distinction between public and domestic.³³⁰ They believed that "women properly belonged in the domestic domain of the household" and objected to their participation in activities outside of the home.³³¹ As some have argued, "the creation of a female, domestic, house-centered sphere was an explicit missionary objective: wifely domesticity . . . was basic to their ideal of Christian civilisation [sic]."³³²

Missionaries' belief in the superiority of men was reflected in the churches and other structures they introduced. As churches and schools were established, male missionaries were in charge but their wives held no formal positions.³³³ The Condominium government took a similar approach, recognizing only men as chiefs and assessors with the authority to negotiate relationships between indigenous communities and government agents.³³⁴ It was the missionaries and other colonial-era expatriates who established the systems of formal inequalities between men and women on the basis of the public and domestic distinction that did not exist prior to their arrival.³³⁵

Over time, *kastom* forged connections with men and the public arena.³³⁶ The evolution of the association of the *nasara* as a place for men only and the allocation of the public forum to men easily followed, but "obscured the complex sets of relationships involving both men and women in various local contexts."³³⁷ The mutation of the public arena implicitly adopted Western models, models that did not exist in the indigenous context.³³⁸ The allocation of the public forum

³²⁸ See generally Toulmin, *supra* note 134, at 31-32.

³²⁹ *Id.*; BOLTON, *supra* note 39, at 56.

³³⁰ See BOLTON, *supra* note 39, at 56.

³³¹ *Id.*

³³² *Id.*

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ BOLTON, *supra* note 39, at 57.

³³⁷ *Id.*

³³⁸ *Id.*

and the authority and expertise to say what *kastom* is or requires to men has resulted in a deeply gendered contemporary interpretation of *kastom*.

As others have noted, "The experience of women within the customary law system appears to be largely a harmful one . . . particularly in the areas of violence against women and children."³³⁹ Women and children who make claims sounding in human rights are accused of trying to be "modern" and betraying *kastom*.³⁴⁰ As others have pointed out, the "irony is that tradition is no longer the practice of the rural masses but the rhetoric of the urban elites, 'those most removed from traditional lifestyle and values and most involved in modernity.'"³⁴¹

B. *Using Genderized Kastom Against Women and Children*

"Custom"
misapplied
bastardised
murdered
a frankenstein
corpse
conveniently
recalled
to intimidate
women³⁴²

The contemporary interpretation of *kastom* is deeply gendered to the detriment of women and children. It guides social and gender roles and expectations in the *ni-Vanuatu* community and imposes a

³³⁹ See Margaret Jolly, *Women-Nation-State in Vanuatu: Women as Signs and Subjects in the Discourses of Kastom, Modernity and Christianity* in *NARRATIVES OF A NATION IN THE SOUTH PACIFIC* 141 (Ton Otto & Nicholas Thomas eds., 1997).

³⁴⁰ See *id.*

³⁴¹ Margaret Jolly, *Specters of Inauthenticity*, 4 *THE CONTEMP. PAC.* 49, 52 (1992).

³⁴² *Id.* at 49 (quoting the poem "Custom" by Grace Mera Molisa). Grace Mera Molisa was a *ni-Vanuatu* poet and politician and was known as one of the pioneering women's advocates. See Shirley Randell, "The Pacific Leader They All Knew as 'Amazing Grace,'" *SYDNEY MORNING HERALD* (Apr. 8, 2002, 10:00 A.M.), <https://www.smh.com.au/national/the-pacific-leader-they-all-knew-as-amazing-grace-20020408-gdf6g7.html>. At Independence, she was a member of the National Constitution Committee and was one of the signatories of the Constitution of Vanuatu. *Id.*

strict division of responsibility and privilege between men and women in which men are considered "inherently superior."³⁴³ This "culturally embedded and pervasive gender inequality" is profoundly harmful to children and contributes to the broader acceptance of violence against women and children.³⁴⁴

Proponents of contemporary *kastom* claim chiefs play a vital role in resolving conflicts in the community and that *kastom* is necessary to maintain stability and social cohesion. While that may be true, in part, the welfare, protection, and best interests of women and children are too often disregarded.³⁴⁵ Decisions that are made in the interest of community may have long-term positive effects on the community, but they are also likely to harm women and children, especially when *kastom* "is used as a substitute rather than in conjunction with formal services."³⁴⁶ For example, requiring a child sexual abuse victim to marry the perpetrator may appease the victim's family and restore the perpetrator to good standing in the community, but it also further victimizes the child and sends a strong message to others that those who complain of being assaulted risk being forced to marry their abusers. The child is further harmed when, after the issue has been resolved through *kastom*, there is no other support or services for the child.³⁴⁷

In the last ten years, advocacy organizations in Vanuatu have worked to educate women and children about their *raets* (rights) through extensive publicity campaigns.³⁴⁸ Their work often focuses on changing men and women's belief that violence against women and children is permissible, even necessary.³⁴⁹ The public dialogue is slowly changing, and more women and children are asserting their *raets*. They are increasingly met with opposition on the grounds that *kastom* dictates women and children's place in society.³⁵⁰ It is also sometimes framed as proper female subordination in *kastom* versus "Western" ideas about human rights and equality which are irrelevant in Vanuatu.³⁵¹ As one man explained:

³⁴³ See MINISTRY OF JUST. & CMTY. SERVS., *supra* note 16, at 12.

³⁴⁴ See *id.*

³⁴⁵ See *id.* at 15.

³⁴⁶ See *id.*

³⁴⁷ See *id.*

³⁴⁸ Interview with Vanuatu Women's Centre (on file with author).

³⁴⁹ *Id.*

³⁵⁰ Brimacombe, *supra* note 45, at 19.

³⁵¹ *Id.*

[W]hen [women] promote human rights, equal rights, freedom of expression, freedom of movement, they don't look out for culture. So, us men? We hold culture. Vanuatu? Men are boss, men are right, men are culture. Women are nothing. This is the culture of Vanuatu. And the people of Vanuatu must protect this because you can't run away from culture.³⁵²

As the vocabulary and understanding of human rights slowly becomes part of the public dialogue, tension rises and *kastom* is wielded more and more as a weapon against women and children.

C. Other Examples of Genderized Kastom

There are other examples of the genderization of *kastom* against women and children, including the preference, requirement even, that women and girls wear island dresses, the “bride price” which confers on husbands the right to physically abuse his wife and children, and the exclusion of women from public places.³⁵³ In each instance, *kastom* is both the stick that compels compliance and the shield that protects those demanding it.

1. *Aelan dres* (Island Dress)

Prior to the arrival of the missionaries, *ni-Vanuatu* dress was simple. Women went topless and wore grass skirts.³⁵⁴ Men typically wore only *nambas* (penis sheaths).³⁵⁵ Offended by nudity, the missionaries introduced European clothing to the indigenous population.³⁵⁶ Men were encouraged to wear shirts and trousers and to work outside of the home.³⁵⁷ Women, on the other hand, were to wear a loose, one-

³⁵² John P. Taylor, *Changing Pacific Masculinities: The “Problem” of Men*, 19 *AUSTL. J. ANTHROPOLOGY* 165, 173 (2008).

³⁵³ See Clare Palmer & Kathryn Ramsay, “Refugee Women and Domestic Violence: Country Studies,” *REFWORLD* (Mar. 2002), <https://www.refworld.org/docid/478e3c6b0.html>.

³⁵⁴ See Maggie Cummings, *Looking Good: The Cultural Politics of the Island Dress for Young Women in Vanuatu*, 23 *THE CONTEMP. PAC.* 33, 33 (2013) [hereinafter Cummings, *Looking Good*].

³⁵⁵ See “The Nambas (Big and Small), *NOMADIC TRIBE*, <https://nomadictribe.com/tribes/the-nambas-big-small> (last visited Dec. 20, 2022).

³⁵⁶ See Brimacombe, *supra* note 45, at 20.

³⁵⁷ Maggie Cummings, *Who Wears the Trousers in Vanuatu?*, in *AUTO-ETHNOGRAPHIES: THE ANTHROPOLOGY OF ACADEMIC PRACTICES* 56 (Anne Meneley & Donna Jean Young eds., 2005) [hereinafter Cummings, *Who Wears the Trousers*].

piece dress, the “Mother Hubbard dress” and work in the home.³⁵⁸ The clothing accomplished several missionary goals. First, the clothing drew an immediately recognizable line between the devout and the non-believers.³⁵⁹ Second, the clothing was intended to ensure modesty in general, and virtue, in particular, for the women.³⁶⁰ Finally, the gender-specific clothing was intended to promote Christian gender roles through dress—men were to work outside the home and women were to work in the home.³⁶¹ European clothing became a “powerful symbol” of the transition from pagan to Christian.³⁶² It also transformed gender differences as differences in status by linking men to the public sphere and women to the domestic sphere.³⁶³

Post-independence, the “suitably modest attire” for women was elevated to *kastom dres blong yumi* (our traditional dress)³⁶⁴ and adopted as the official national dress of Vanuatu.³⁶⁵ Over time, the dress has become a source of pride for many *ni-Vanuatu* women.³⁶⁶ Some women view it as a patriotic symbol.³⁶⁷ Women in island dresses are a common sight throughout the islands; they are worn as everyday clothing and for special events. The dresses have also been adopted as the formal employee uniforms for many businesses, especially those that cater to tourists.

Still, the island dress is not embraced by everyone. Some younger women and teenagers associate the island dresses, which they refer to as “mama dresses,” with the status of the wearer rather than *kastom* or patriotism.³⁶⁸ They view the dresses as a benign clothing

³⁵⁸ *Id.* (describing the dresses as “long, shapeless frocks that resembled a nightgown”).

³⁵⁹ *See id.*

³⁶⁰ *See id.*

³⁶¹ *See id.*

³⁶² *Id.*

³⁶³ Cummings, *Who Wears the Trousers*, *supra* note 357, at 56.

³⁶⁴ Cummings, *Looking Good*, *supra* note 354, at 33-34.

³⁶⁵ Brimacombe, *supra* note 45, at 20. On the other hand, the traditional *namba* worn by men is depicted on the Vanuatu Coat of Arms. *See* “Discover the Meaning Behind Vanuatu’s Coat of Arms,” AIR VANUATU, <http://stagingtm.airvanuatu.com/home/travel-information/vanuatu-coat-of-arms> (last visited Dec. 20, 2022).

³⁶⁶ During informal discussions with *ni-Vanuatu* women about the dress, they say: 1) wearing the dress makes them feel proud to be *ni-Vanuatu*; 2) the dress is their *kastom*; and 3) it is a way to show respect for their husbands and fathers. Field notes on file with author. Others say that wearing “western” clothing is disrespectful and will “cause problems.” *Id.* Others were more pragmatic and said the dress is comfortable in the tropical heat. *Id.*; *see also* Cummings, *Looking Good*, *supra* note 354, at 39 (describing women’s responses to how women should dress).

³⁶⁷ Field notes on file with author.

³⁶⁸ *Id.*

choice for older women and laughingly shun them as “something my mother and grandmother wear.”³⁶⁹ At a pragmatic level, many young women reject island dresses in favor of long shorts or trousers simply because they are more comfortable.³⁷⁰

For other women, island dresses are shunned for more serious reasons. For many young women, their rejection of the island dress stems from an expression of autonomy and resentment at being told what “proper” young women “should” wear.³⁷¹ In short, invoking *kastom*, chiefs often argue that women who do not wear island dresses are “breaking our tradition . . . it is not good for [them] to wear pants like a man.”³⁷² They also argue that a girl who wears trousers is immodest and responsible for the *trabol* (trouble) that results.³⁷³ The *trabol* is, narrowly, that she incites men to sexually assault women because men cannot be expected to control themselves when women wear trousers. More broadly, women wearing trousers is the cause of the general breakdown in society.³⁷⁴ That this sentiment is shared by much of the male majority population is evident in the popularity of “Island Dress,” a song played on the local radio:

All you girls must put on a dress
 Cover up your bodies
 Don't give bad thoughts to boys
 Look at this girl
 Wearing jeans!
 You can see everything!
 Ohh!
 And a girl in a long t-shirt
 With shorts!
 She doesn't have any respect!
 She wants to act the same as a boy

³⁶⁹ *Id.* They prefer western clothing suitable to the pacific climate, such as long surfer shorts and baggy t-shirts.

³⁷⁰ *Id.*

³⁷¹ *Id.*

³⁷² Bruce Hill, “Chiefs in Vanuatu Being Challenged on Dress Codes by Young Women,” ABC P_{AC}. (Mar. 6, 2017), <https://www.abc.net.au/radio-australia/programs/pacificbeat/chiefs-in-vanuatu-being-challenged-on-dress-codes/8329404>.

³⁷³ See Cummings, *Who Wears the Trousers*, *supra* note 357, at 54 (describing the view that women who wear trousers, instead of island dresses, are “disrespectful” and “disrespect incites rape”).

³⁷⁴ See *id.*

All girls of ours
 Must put on an island dress
 A nice dress
 Like all girls wear
 A nice dress
 Like all the girls wear.³⁷⁵

The rationale for island dresses rings in both protectionism and blame.³⁷⁶ On the one hand, wearing island dresses is supposed to protect women by not inciting men to rape.³⁷⁷ On the other hand, a woman who does not wear an island dress is to blame for her own victimization.³⁷⁸ Not surprisingly, many women are unwilling to be made the “scapegoat” for the shrinking reach of *kastom* authority.³⁷⁹

In response, chiefs have often resorted to passing dress codes. Chiefs on Paama, one of the smaller islands in the archipelago, once instituted a dress code for women on the island and prohibited clothing other than island dresses.³⁸⁰ Moreover, they extended the dress code to Paama women living on other islands.³⁸¹ Again, several years later, in one of the most publicly contentious attempts, the *Malvatumauri*, supported by church leaders, attempted to pass a new a dress code restricting the right of *ni-Vanuatu* women to wear trousers, shorts, pants or jeans.³⁸² One chief stated:

³⁷⁵ The song was initially envisioned as part of workshop on gender discrimination for a local non-government organization. Later, in conjunction with *Wan Smalbag* (One Small Bag)(WSB), a local participatory theatre group, it became one of the most popular full-fledged musical theatre productions, Solid Sistas. The plot concerned issues facing young women in Vanuatu, including violence, prostitution, child abuse and suicide. The highly-charged topics were presented through less controversial topics such as women’s clothing and popular music. The song made its way to the mainstream radio and became very popular. Some, without knowing its context, embraced it as a statement of what young women should wear. Others, aware of the context, embraced it as something of a “rebel anthem.” Field notes on file with author; see also Brimacombe, *supra* note 45, at 23 (describing the WSB workshop and subsequent theatre production).

³⁷⁶ See Cummings, *Who Wears the Trousers*, *supra* note 357, at 54.

³⁷⁷ See *id.*

³⁷⁸ See *id.*

³⁷⁹ *Id.* at 59.

³⁸⁰ *Id.* at 53.

³⁸¹ Cain, *Convergence or Clash*, *supra* note 81, at 54.

³⁸² See Maggie Cummings, *The Trouble with Trousers: Gossip, Kastom, and Sexual Culture in Vanuatu*, in *MAKING SENSE OF AIDS: CULTURAL, SEXUALITY, AND POWER IN MELANESIA* 144-45 (Leslie Butt & Richard Eves eds., 2008).

If a girl wore shorts in my village, everyone would whisper behind her back. They would say she must be from “town” or that she is trying to sell herself. And who could blame them? Only a girl with no respect for *kastom* would dress like a white woman like that, showing off her body. She’d have to be careful, or someone would make trouble for her.³⁸³

In both instances, the bans were contested and received vast media attention.³⁸⁴ The dress codes were withdrawn, but similar ones are regularly raised and informally enforced. Like *kastom* adoptions, the use of manufactured *kastom* in this way is an attempt to deny women and girl’s autonomy and control their behavior through something as innocuous as clothing.

2. *Braed Praes* (bride price) and *Pen Woman* (buy the woman)

In *long kastom*, women moved from one clan to another when they married.³⁸⁵ Their relocation was considered essential to the creation or strengthening of *rods* (roads), or links between people from different groups.³⁸⁶ These social links were important in establishing valuable alliances between clans and across the archipelago. At marriage, the *braed praes* ceremony was a formal recognition of the new alliances the wife brought to her husband’s clan.³⁸⁷ While *braed praes* practices differed from one clan to another, they generally involved the groom’s family giving goods to the bride’s family.³⁸⁸ The *braed praes* symbolized the separation of the bride from her former

³⁸³ *Id.* at 145.

³⁸⁴ Cummings, *Who Wears the Trousers*, *supra* note 357, at 53-54.

³⁸⁵ See Lissant Bolton, *Women, Place and Practice in Vanuatu: A View from Ambae*, 70 OCEANIA 43, 49 (1999).

³⁸⁶ See Margaret Jolly, *Braed Praes in Vanuatu: Both Gifts and Commodities?*, 85 OCEANIA 63, 71 (2015) [hereinafter Jolly, *Braed Praes in Vanuatu*]; MARGARET JOLLY, *WOMEN OF THE PLACE: KASTOM, COLONIALISM AND GENDER IN VANUATU* 117-18 (1994); Craig Lind, *Why the Future is Selfish and Could Kill: Contraception and the Future of Paama*, in *PACIFIC FUTURES: PROJECTS, POLITICS AND INTERESTS* 87 (Will Rollason ed., 2014).

³⁸⁷ Alice Servy, *‘We’ve Paid Your Vagina to Make Children!’: Bridewealth and Women’s Marital and Reproductive Autonomy in Port-Vila, Vanuatu*, 90 OCEANIA, 292-308, 295 (2020) (describing how women, through the bride price, are considered “essential to the strengthening or creation of what are called “roads” (rod), in other words links between people (and not just men) from different groups”); see also Jolly, *Braed Praes in Vanuatu*, *supra* note 386, at 71 (describing the value of women “as roads linking men of different *vanua* (hamlets)”).

³⁸⁸ See Servy, *supra* note 387, at 292.

nakamal and affiliated her with the groom's clan.³⁸⁹ It was intended to cement relationships between the two clans and to transfer women's productive and reproductive capacities from her family to her husband's family. Finally, through the *braed praes*, the groom's relatives passed on new relationships of mutual assistance and obligations while displaying their social and economic status.³⁹⁰ Money was not part of *braed praes*.³⁹¹

The missionaries, and later the colonial authorities, strongly opposed *kastom* marriages and the *braed praes* practice.³⁹² First, they objected to the practice because they believed it was degrading to young girls and women. The missionaries were particularly offended by the age difference in some marriages between young brides and much older men.³⁹³ Secondly, the missionaries wanted to reshape traditional clan alliances into something more consistent with Christian ideas about domesticity and nuclear families.³⁹⁴ This coalesced with the colonial authorities' desire to exert control over the local population and maintain a stable supply of workers by managing the low fertility rates.³⁹⁵ The Condominium government believed that marriages between young women and much older men resulted in fewer pregnancies, which, in turn, resulted in an insufficient supply of workers.³⁹⁶ The missionaries and the Condominium government recognized they were unlikely to prevent the practice entirely and instead turned their efforts to regulating it.³⁹⁷ Working from the premise that a high *braed praes* effectively excluded younger men from marrying because they could not afford it, the Condominium government eventually enacted the Joint Regulation on Marriage which set a cap on *braed praes*.³⁹⁸

³⁸⁹ *Id.* at 294.

³⁹⁰ *Id.* at 298.

³⁹¹ See *Banga v. Waiwo*, (1996) VUSC 5 [Supreme Court] (Vanuatu) (explaining that "in true custom, money plays no part at all as there is no money in custom. It is only in relatively recent times that money has made its way into custom settlements.").

³⁹² Jolly, *Braed Praes in Vanuatu*, *supra* note 386, at 66.

³⁹³ *Id.* at 66-67 (detailing missionaries' accounts of the "wickedness" of a man selling his sisters to "men old enough to be their grandfathers").

³⁹⁴ Alexandra Wiedmer, *The Imbalanced Sex Ratio and the High Bride Price: Watermarks of Race in Demography and the Colonial Regulation of Reproduction*, 39 *SCI. TECH. & HUM. VALUES* 538, 545 (2014).

³⁹⁵ *Id.* at 545-46.

³⁹⁶ *Id.*

³⁹⁷ *Id.*

³⁹⁸ *Id.* at 546.

By independence in 1980, more people were living in urban areas and engaging in paid work.³⁹⁹ One of the consequences in this change in demographics was that the importance of the alliances women brought to their husband's clan at marriage began to fade.⁴⁰⁰ At the same time, as more people left family farms to work in towns, money began to replace the food, livestock, and handmade materials that had made up the *braed praes* in *long kastom*.⁴⁰¹ Over time, money has become the majority of the *braed praes* and traditional items have mostly been relegated to token offerings.⁴⁰²

Like the island dress, the *braed praes* is criticized as a retelling of *kastom* in an attempt to control women and girls. For example, when husbands are accused of violence against their wives, they often claim they are entitled to beat their wives because they have paid the *braed praes*.⁴⁰³ Referred to as *pem woman* (buy the woman), it is increasingly viewed as a commodity transaction—wives have a cash price like market goods and the “husband acquires ownership of her sexual, productive and reproductive capacities, and the right to violently extract them from her.”⁴⁰⁴

Likewise, payment of a *braed praes* has also been raised as a justification of a husband's violence against his children.⁴⁰⁵ It has been argued that as the product of the wife's reproductive ability, a husband's, or his family's, ownership rights extend to his children and he may treat them as he pleases.⁴⁰⁶ In *Molu v. Molu*, for example, the reallocation of a child came before the court in a divorce and child

³⁹⁹ See Jolly, *Braed Praes in Vanuatu*, *supra* note 386, at 65.

⁴⁰⁰ See Servy, *supra* note 387, at 304.

⁴⁰¹ See Jolly, *Braed Praes in Vanuatu*, *supra* note 386, at 72.

⁴⁰² Interview with Don Paterson, Emeritus Professor of L., Univ. of the S. Pac., in Port Vila, Vanuatu (Apr. 28, 2015) (on file with author).

⁴⁰³ FORSYTH, *supra* note 10, at 14. Women describe it differently: “Bride price makes me feel like I am a motorboat or a truck that someone buys, it makes my family greedy and wanting a bigger price; it makes my parents-in-law angry if I am barren or do not produce a son and it makes my husband think that I must always obey him.” *Id.*

⁴⁰⁴ For example, Mere, a married 24-year-old woman describes her situation as “just what happens.” Her husband “drinks too much” and becomes angry when Mere fails to “cook the right food” or “the baby is too loud.” He hits her almost daily and has badly injured her several times, including when he threw boiling water at her, causing severe burns to her arm. Mere resents his treatment of her, but explains that she “got a good [bride] price so he allowed to hit her.” Field notes on file with author; see also Jolly, *Braed Praes in Vanuatu*, *supra* note 386, at 64.

⁴⁰⁵ Jolly, *Braed Praes in Vanuatu*, *supra* note 386, at 64

⁴⁰⁶ See *id.*

custody case.⁴⁰⁷ The court was asked to decide the legal custody of a child who had earlier been removed from the mother by the father and his relatives without the mother's consent.⁴⁰⁸ Prior to the breakdown of the marriage, the father sent the toddler to live with paternal relatives on another island in a *kastom* adoption.⁴⁰⁹ The father and his relatives claimed the right to do so over the mother's objection because they had paid her *braed praes* at the time of the marriage.⁴¹⁰ Having paid the *braed praes*, they could properly claim the toddler as "the product of their hard labour" and the mother had no right to object.⁴¹¹ Essentially, instead of arguing that the child's best interests were in remaining where he was with his paternal relatives, the father and his relatives' argument was based on their right to the child by virtue of having paid the mother's *braed praes*. In deciding between custody with the mother or the father, the court granted custody to the father and his relatives, prioritizing the *kastom* adoption, based on the right of possession, over the mother's objection and in the absence of any evidence that she had failed to parent appropriately.⁴¹²

3. Exclusion of Women at *Nakamals* and *Nasaras*

Before the arrival of the missionaries, women were highly regarded and treated with respect in most of the islands.⁴¹³ In some places, women had their own grade-making ceremonies and held leadership positions which gave them status and recognition.⁴¹⁴ Women also were permitted at *nasaras* and *nakamals*. In *long kastom*, in most places in the archipelago, men and women were relatively equal.⁴¹⁵

What was permissible for men and women did differ in one significant way: men were permitted to drink kava, but women were not.⁴¹⁶

⁴⁰⁷ *Molu v. Molu*, (1998) VUSC 15 [Supreme Court] (Vanuatu).

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*; see also Brown, *supra* note 116, at 83 (explaining that after the bride price is paid, the children "belong" to the father's family).

⁴¹¹ *Molu*, (1998) VUSC 15.

⁴¹² *Id.*

⁴¹³ John P. Taylor, *The Social Life of Rights: "Gender Antagonism", Modernity and Raet in Vanuatu*, 19 AUSTL J. ANTHROPOLOGY 165, 173 (2008).

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

⁴¹⁶ There were some limited exceptions—it was sometimes used for medical purposes and women of status in North Pentecost drank kava. Taylor, *Janus and the Siren's Call*, *supra* note 46, at 289.

Kava is a drink made from the rootstock of the methysticum plant that has been ground and steeped in lukewarm water.⁴¹⁷ It acts as a muscle relaxer, analgesic, soporific, diuretic and local anesthetic and is classified as a sedative hypnotic.⁴¹⁸ Kava drinking served many purposes, including a ceremonial function; it was used during ceremonies to mark births, circumcisions, marriages, and deaths.⁴¹⁹ It was also used for spiritual purposes, either as a sacrifice to the gods or by achieving a state of kava drunkenness that was believed to make men able to communicate with their ancestors.⁴²⁰ In everyday use, disputes were often settled over kava drinks and men often gathered to drink kava socially.⁴²¹

Women were prohibited from drinking kava, but not excluded from the places and events where it was served, because it was believed that “kava is a woman, and a woman can’t take back a woman.”⁴²² Understood as female, the “seductive allure” of kava has been likened to “a siren’s call—*mi harem wan woman i singaot* (I hear a woman calling).”⁴²³ Kava was understood to be “charged with female potency,” and its consumption by women “might endanger the fertility of women and sexual potency of men.”⁴²⁴

Later, as the missionaries moved women into domestic spaces and men into public spaces, kava drinking naturally followed men to the *nakamals* and *nasaras*.⁴²⁵ Over time, because of *kastom* the rationale as to why *nakamals* and *nasaras*, and kava drinking, became the sole province of men.⁴²⁶ The current day consequence of this segregation is that women are still prohibited from drinking kava; women

⁴¹⁷ Lamont Lindstrom, *Kava, Cash, and Custom in Vanuatu*, CULTURAL SURVIVAL (Mar. 3, 2010), <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/kava-cash-and-custom-vanuatu>. Served at room temperature in hollowed out coconut half shells, kava is often described as having an earthy taste and smell. *Id.*

⁴¹⁸ *Id.* Kava, unlike alcohol, does not interfere with a person’s ability to think clearly and it is not a hallucinogen. *Id.*

⁴¹⁹ *Id.*

⁴²⁰ *See id.*

⁴²¹ *Id.*

⁴²² Taylor, *Janus and the Siren’s Call*, *supra* note 46, at 279.

⁴²³ *Id.* at 290.

⁴²⁴ *Id.* at 291.

⁴²⁵ Interview with Don Paterson, Emeritus Professor of L., Univ. of the S. Pac., in Port Vila, Vanuatu (Apr. 3, 2015 (on file with author)); *see generally*, FORSYTH, *supra* note 10, at 95, 105.

⁴²⁶ Interview with Don Paterson (Apr. 3, 2015), *supra* note 425; *see also* Taylor, *Janus and the Siren’s Call*, *supra* note 46, at 283.

who do drink kava in public places are generally considered to be “like a prostitute.”⁴²⁷ Perhaps more importantly, the exclusion of women from *nakamals* and *nasaras*,⁴²⁸ in this way, excludes women from participating fully in community events, including those related to local government. Moreover, it significantly undercuts women’s opportunities to conduct business in casual settings. In much the same way that business in America is often conducted informally on golf courses, much of the business and politics of Vanuatu is conducted in *nakamals* and *nasaras*. The exclusion of women from these venues deprives them of the ability to participate in the workings of the larger community. Indeed, as social development organization active in Vanuatu has reported, “women’s views are rarely represented at the *nakamal*.”⁴²⁹

CONCLUSION

Kastom is a living, breathing thing, the “beating heart of Vanuatu.”⁴³⁰ It can be seen almost everywhere and is proudly on display from images featured on the national flag, coins, and banknotes to the women about town in a rainbow of island dresses, to the shops on Main Street selling kava to tourists, and in the tours of “*kastom* villages.” Indeed, the energetic merchandization of *kastom* for tourism purposes is nearly impossible to miss. This version of *kastom* has little to do with indigenous practices; instead, like the plastic grass skirts sold in tourist shops, *kastom* has become a neatly packageable commodity.

The other version of *kastom*, the version manufactured as a common national identity leading up to independence and weaponized against women and children, is not so immediately obvious. First, at independence, the plural legal system took effect—a formal court system based on statutory and common law and an informal *kastom* sys-

⁴²⁷ *Id.* at 292.

⁴²⁸ This is not to say that all women are excluded from all *nakamals* all the time. There are *nakamals* that sell kava (*i.e.*, kava bars), as commercial enterprises, that serve foreigners and tourists, including women. *See, e.g., id.* at 288. It is the other *nakamals*, like private clubs, where admission is by membership or invitation only that are at issue here.

⁴²⁹ *Women and Business in the Pacific*, ASIAN DEV. BANK, 310 (Aug. 2020), <https://www.adb.org/sites/default/files/publication/445821/women-business-pacific.pdf>.

⁴³⁰ *8 Ways to Experience Local Culture & Kastom*, ANSWER THE CALL OF VANUATU, <https://www.vanuatu.travel/en/8-ways-to-experience-local-culture-kastom> (last visited Dec. 20, 2022).

tem presided over by chiefs at the village level. The plural system has resulted in two adoption systems in which similarly situated children are treated differently. In state adoptions, the primary consideration is a child's best interest and there is a prohibition against improper benefits to third parties in exchange for the adoption. In *kastom* adoptions, a child's best interest is rarely considered, and not only is a benefit to a third party not prohibited, it is often one of the primary reasons for the adoption in the first place.

Second, the negative consequence of manufactured *kastom* is not limited to isolated practices such as adoption. It has, more broadly, served to formalize the male-dominated power structure, first envisioned by the missionaries, to the detriment of women and children. *Kastom* has become the justification for a wide range of discriminatory practices and policies related to women and children's autonomy and well-being.

The better analysis of the law is that the CRC, the Adoption Act, or the Guardianship Act apply to *kastom* adoptions. Alternatively, even if they do not, *kastom* adoptions are still subject to the fundamental adoption principles to act in a child's best interest and to prohibit the benefits to a third party in exchange for the adoption. From the anecdotal evidence, it is clear that *kastom* adoptions are not in children's best interest and do occur precisely for the benefit of others. Moreover, because the child is not included in the discussions, the contemporary practice of *kastom* adoptions is also inconsistent with *long kastom*. In conclusion, *kastom* adoptions are inconsistent with fundamental child welfare principles and *long kastom*. Consistent with its representation to the Committee on the Rights of the Child, *kastom* adoptions in Vanuatu should comply with the international and domestic law.

